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Large-Scale Land Acquisitions and Legal Pluralism in Africa: The Case of Zambia and Ghana

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“Buy land. They’re not making it anymore.”

Mark Twain¹

¹ Quoted in Paula Casal, "Global Taxes on Natural Resources," *Journal of Moral Philosophy* 8, no. 3 (2011), p. 307.

Abstract

The last decade saw an increase in foreign investor interest in the acquisition of agricultural land in the global South. This phenomenon has come to be defined as land grabbing, due to the controversial nature of land deals and their impact on the livelihood of rural populations. According to recent estimates, more than 60 percent of these acquisitions have taken place in sub-Saharan Africa, a region characterized by inherently pluralistic legal systems.

In line with regional trends, Ghana and Zambia have been targeted by foreign investors interested in acquiring large tracks of land for agricultural purposes. Land tenure systems of these two countries are the complex outcome of hybrid legal orders that stratified over the centuries. In particular, the role of traditional authorities, i.e., chiefs, in land management is still prominent, as respectively 80 and 94 percent of land are regulated by customary law.

By adopting a legal pluralist perspective, this thesis looks at the dynamics between customary and statutory tenure in Ghana and Zambia in light of contemporary land investment processes, which are critically discussed from a multi-disciplinary angle. By outlining land tenure systems, a legal analysis of the framework in which land investments are negotiated is provided. In particular, this thesis focuses on the process through which investors access land in Ghana and Zambia, by discussing the procedures and guarantees envisioned by national legislation and customary law. Together with a critical analysis of land legislation in the two countries, it illustrates large-scale acquisition cases and incorporates insights from empirical research conducted in rural districts. It then offers a comparison of investment practices in the two countries to illustrate the main challenges that large-scale land acquisition pose at the local level.

This thesis contributes to the literature on land investments and to the broader global land debate by focusing on the pluralist nature of the land tenure systems of Ghana and Zambia and discussing empirical evidence of land acquisition practices.

Introduction

Although at the world level agriculture accounts for less than one percent of foreign direct investment (FDI),¹ the past ten years have seen a growth in FDI in agriculture in the global South.² After decades of neglect, investors increasingly view agriculture as a profitable and growing sector with appealing yield opportunities. In the global South, where mechanized agriculture is underdeveloped and the agricultural sector accounts for a substantial share of GDP and employment,³ this renewed interest may bring about opportunities for economic development and poverty alleviation, together with substantial profits for investors.⁴

In light of this development potential, in the global South many governments have introduced investment policies that provide tax and other fiscal incentives to the agricultural sector.⁵ Foreign investors are encouraged by corporate tax holidays, favorable import duty regimes for agricultural inputs, and other agricultural export

¹ FDI by sector, UNCTAD 2015, www.unctadstat.unctad.org (accessed 1 June 2015).

² *Ibid.* Data on FDI in agriculture suffer from significant limitations since the two main datasets, namely Unctad (www.unctadstat.unctad.org) and FDI Market (<http://www.fdimarkets.com>), do not include all countries worldwide. In the case of UNCTAD, data on FDI in agriculture are only available for 44 countries. Moreover, the number of countries for which data are available varies across years. A critical assessment of the existing datasets on FDI in agriculture can be found in: Sarah K. Lowder and Brian Carisma, "Financial Resource Flows to Agriculture: A Review of Data on Government Spending, Official Development Assistance and Foreign Direct Investment," in *ESA Working Papers* (Rome: Food and Agriculture Organization, 2011).

³ Agriculture, value added (% of GDP), World Development Indicators 2016, <http://data.worldbank.org/indicator/NV.AGR.TOTL.ZS> (accessed 1 June 2016); employment in agriculture (% of total employment), World Development Indicators 2016, <http://data.worldbank.org/indicator/SL.AGR.EMPL.ZS> (accessed 1 June 2016).

⁴ It is important to note that in the global South official development assistance to agriculture has steadily decreased (David Hallam, "International Investment in Developing Country Agriculture: Issues and Challenges," *Food Security Journal* 3, no. 1 (2011)). Moreover, the availability of credit for commercial agriculture is limited (Pascal Liu, "Impacts of Foreign Agricultural Investment on Developing Countries: Evidence from Case Studies" in *FAO Commodity and Trade Policy Research Working Paper* (Rome: Food and Agriculture Organization, 2014)). As such, FDI has become a crucial tool to promote agricultural investment in the global South. This aspect will be discussed further in Chapter 1.

⁵ Gabor Konig, Carlos A. da Silva, and Nomathemba Mhlanga, "Enabling Environments for Agribusiness and Agro-Industries Development: Regional and Country Perspectives," in *Agribusiness and Food Industries Series* (Rome: Food and Agriculture Organization, 2013).

incentives.⁶ By means of national investment agencies, many governments promote their agricultural potential abroad and actively seek suitable investors.

Land is pivotal to this equation. The availability of land for agricultural development is the physical precondition for foreign investment in agriculture. In the case of mechanized agriculture, large tracks of arable land are needed to make the investment profitable due to economies of scale.⁷

Simultaneously, land is deeply embedded in rural societies and represents the main source of livelihood in the global South, where the majority of population lives in rural areas.⁸ Because of the allocation of land to foreign investors, local land users face the risk of dispossession and displacement. In this event, the development opportunity brought about by foreign investments may in effect result in the impoverishment of rural communities. The mitigation of this risk is one of the tasks of land management institutions at the national level, which are designed to ensure that decisions over the use of land benefit the country and its people.

Consequently, land management poses several challenges in the global South. The colonial encounter profoundly shaped domestic land tenure systems by imposing European notions of property and contract over different legal experiences.⁹ As a result of complex historical and ongoing transformations, land tenure systems consist of a

⁶ The typology of incentives varies across countries. The full set of incentives to foreign investors is generally enumerated in the investment guides produced by national governments and specialized agencies. For the case of Zambia and Ghana, see chapters 3 and 4.

⁷ The relative productivity of large-scale and small-scale agriculture and their development potential have been extensively discussed in the literature and are beyond the scope of this thesis. For a concise account of the debate, in which the authors argue that small-scale agriculture is key to poverty reduction, see: Peter Hazell et al., "The Future of Small Farms for Poverty Reduction and Growth," in *2020 Discussion Paper* (New York: International Food Policy Research Institute, 2007).

⁸ Rural population (% of total population), World Development Indicators 2016, <http://data.worldbank.org/indicator/SP.RUR.TOTL.ZS> (accessed 1 June 2016).

⁹ See for example Menski's review of the comparative studies of African laws: Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge: Cambridge University Press, 2006), 380-392. On the role of law in the colonial exploitation of the global South, see: Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law Is Illegal* (London, Blackwell: 2008).

plural web of norms that encompass local customary rules, state legislation, colonial ordinances, and international law.¹⁰ In between the nodes of this normative web, the actors involved in land transactions—i.e., local land users, foreign investors, government agencies, and traditional leaders—have different types of access to resources and therefore different abilities to influence the outcomes of these transactions. The normative uncertainty that derives from the coexistence of different and sometimes contradictory norms may be used as a tool in this process and reproduce the asymmetries at play among the actors. These asymmetries have both a horizontal and a vertical dimension: the horizontal asymmetries are those at play between actors of the same legal order, whereas the vertical ones exist between actors across the different legal orders. In order to scrutinize the distributional outcomes of land transactions, both these dimensions shall be carefully analysed by keeping in mind that under these asymmetric conditions, the win-win situation in which both investors and rural communities benefit may not materialize.

A closer analysis of recent agricultural investment flows and of related land transactions reveals the centrality of sub-Saharan Africa, since 70 percent of all large-scale land acquisitions take place in this region.¹¹ Many studies have scrutinized this

¹⁰ Legal pluralism should not be understood as a specific feature of postcolonial legal systems. Contemporary approaches to legal theory have overcome the rigid positivist understanding of law as a body of written norms, and have emphasized that law is a multifaceted concept that varies across contexts and includes all the experiences that social actors identify as 'legal' (Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global," *Sydney Law Review* 30 (2008), 396). Moreover, the increased role of international law-making organizations has introduced a further normative order in national legal systems (Paul Schiff Berman, "Global Legal Pluralism," *Southern California Law Review* 80 (2007)). As such, countries of the global North experience legal pluralism as well, although in ways that differ from the postcolonial context. Legal pluralism will be discussed in Chapter 1.

¹¹ Klaus Deininger and Derek Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?* (Washington, DC: World Bank, 2011). It is important to note that there is no agreement on the data concerning large-scale land acquisitions; a critical discussion on the weaknesses of existing datasets and their implications for current research can be found in: Marc Edelman, "Messy Hectares: Questions About the Epistemology of Land Grabbing Data," *Journal of Peasant Studies* 40, no. 3 (2013) and Carlos Oya, "Methodological Reflections on 'Land Grab'

phenomenon and provided useful insights into its multifaceted dimensions; the majority of scholars have adopted a critical approach to large-scale land investments and have increasingly challenged their developmental potential by focusing instead on the forcible nature of the land acquisitions, which have been popularly termed as “land grabs.”¹² Many authors have focused on the consequences of large-scale land investments, by looking at their livelihood and environmental impacts,¹³ whereas others have assessed them in terms of compliance with international human rights law.¹⁴ Fewer studies have focused on the legal process through which agricultural investments unfold in the receiving countries by analyzing it in light of land tenure systems.¹⁵ Although underrepresented in the vast literature on large-scale land investments, this aspect is crucial: the processes through which foreign investors access land directly influences the distributive outcomes of these transactions and can therefore shed light on the consequences of the increased acquisition of land.

Databases and the ‘Land Grab’ Literature ‘Rush’,” *Journal of Peasant Studies* 40, no. 3 (2013). This aspect will be discussed in Chapter 2.

¹² See for example: Lorenzo Cotula, *The Great African Land Grab?: Agricultural Investments and the Global Food System* (London: Zed Books, 2013); Ben White et al., “The New Enclosures: Critical Perspectives on Corporate Land Deals,” *Journal of Peasant Studies* 39, no. 3-4 (2012); Annelise Zoomers, “Globalisation and the Foreignisation of Space: Seven Processes Driving the Current Global Land Grab,” *Journal of Peasants Studies* 37, no. 2 (2010).

¹³ See among others: Lorenzo Cotula et al., “Agricultural Investment and International Land Deals: Evidence from a Multi-Country Study in Africa,” *Food Security* 3, no. 1 (2011); George Schoneveld, Laura German, and Eric Nutakor, “Land-Based Investments for Rural Development? A Grounded Analysis of the Local Impacts of Biofuel Feedstock Plantations in Ghana,” *Ecology and Society* 16, no. 4 (2011); Sonja Vermeulen and Lorenzo Cotula, “Over the Heads of Local People: Consultation, Consent, and Recompense in Large-Scale Land Deals for Biofuels Projects in Africa,” *The Journal of Peasant Studies* 37, no. 4 (2010).

¹⁴ See for example: Priscilla Claeys and Gaëtan Vanloqueren, “The Minimum Human Rights Principles Applicable to Large-Scale Land Acquisitions or Leases,” *Globalizations* 10, no. 1 (2013); Rolf Künemann and Sofía Monsalve Suárez, “International Human Rights and Governing Land Grabbing: A View from Global Civil Society,” *Globalizations* 10, no. 1 (2013); Olivier De Schutter, “The Green Rush: The Global Race for Farmland and the Rights of the Land Users,” *Harvard International Law Journal* 52, no. 2 (2011).

¹⁵ See: Laura German, George Schoneveld, and Esther Mwangi, “Contemporary Processes of Large-Scale Land Acquisition in Sub-Saharan Africa: Legal Deficiency or Elite Capture of the Rule of Law?,” *World Development* 48, (2013); Kerstin Nolte, “Large-Scale Agricultural Investments under Poor Land Governance in Zambia,” *Land Use Policy* 38, (2014).

With a focus on the latter, this thesis discusses and compares large-scale land investments in Zambia and Ghana, two countries significantly targeted by investors. In both countries the majority of land is held under customary tenure, and as such it is administered on a local level by customary authorities. This entails that multiple sets of rules apply to the transactions with investors and also that different challenges may emerge. In particular, the questions this research addressed are the following: How did plural land tenure regimes change over time? How do investors access land and what norms regulate large-scale land investments at the local level? How do customary and state law contribute to shaping local outcomes and which actors use them as tools in their transactions?

In order to address these research questions, a review of the literature has been conducted, followed by empirical research in the two countries forming the object of this study. With its analysis based on empirical data, this study aims to contribute to the literature on large-scale land acquisitions with an inter-disciplinary analysis of investment processes firmly grounded in the legal framework applicable to land. In particular, this research provides additional empirical evidence on large-scale land investments and analyzes it through the lens of legal pluralism, in order to shed light on the asymmetries of power at play at the local level. Moreover, the comparison between the two countries will illustrate similar patterns of alienation of customary land and show the weaknesses of customary systems before commercial pressures on land.

This work is organized as follows. Chapter 1 will discuss the theoretical framework of this research by providing a critical discussion of the role of African customary law within comparative legal studies and elaborate on the role of legal pluralism. It will then set out the methodology adopted and discuss the way in which the empirical research has been conducted. Chapter 2 will then review the debate on the

global land rush by highlighting the key issues analyzed in the literature. It will also discuss the features of land tenure systems in sub-Saharan Africa and illustrate how these characteristics have been taken into account in the literature on large-scale land acquisitions. Chapters 3 and 4 will discuss large-scale land acquisitions respectively in Zambia and Ghana. Both the chapters will first provide an overview on the land tenure systems from a historical perspective, by discussing the role of colonialism in shaping land administration. They will then look at contemporary land management and illustrate the peculiarities of land held under customary tenure. They will also discuss large-scale land acquisitions in each country, first by providing an overview of agricultural investments, second by illustrating how investors access land, and third by analyzing evidence from the empirical research conducted and problematizing it. Chapter 5 will compare the cases of Ghana and Zambia and identify similarities and differences in the investment processes. The conclusions will finally highlight the key findings of the work and illustrate the main challenges to be addressed with regards to large-scale land acquisitions.

Chapter 1:

Theoretical and Methodological Framework

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I. Introduction

As the next Chapter will discuss, large-scale land acquisitions have been analyzed from different points of view by a broad spectrum of disciplines, ranging from development studies to international law. Comparative law scholars have not yet sufficiently contributed to this literature and little attention has been paid so far to the interaction between land investments and the complex dynamics of sub-Saharan legal regimes.¹

The characteristics of land tenure regimes in Africa, which will be outlined in the next Chapter, require an analytical and methodological approach that accounts for the plurality that characterizes their legal framework. As such, the first part of this Chapter is devoted to discussing these aspects, by outlining the theoretical approach of this research. It will start by providing a brief introduction to the comparative study of legal regimes in sub-Saharan Africa: by looking at legal families, the next Section will discuss the approach of comparative law towards African law and highlight the main developments. Next, the Chapter will discuss the concept of customary law and review

¹ An exception can be found in the work of Cotula, who emphasizes the pluralist dimension of African legal systems. See for example: Lorenzo Cotula, "Commercial Pressures and Legal Rights: The Trouble with the Law Regulating Agricultural Investment in Africa," *QA - Rivista dell'Associazione Rossi-Doria* 2 (2013).

its main characteristics, while at the same time providing an overview of the critiques that have been set forward in the literature. It will then review the literature on legal pluralism in its multifaceted nature, by emphasizing the main theoretical challenges it faces.

The second part of the Chapter will connect the analytical framework to the research question and the methodology used for the empirical research. It will explain the methodological choices whilst at the same time emphasizing the scope of the research, together with the main challenges and limitations. It will also provide the definitions of key concepts used in the work. The choice of the countries under comparison will be supported by the data available and the historical and legal characteristics of the countries.

II. Comparative Law and the Study of African Law

The interconnectedness of the globalized world poses new challenges to comparative lawyers and requires the use of new analytical tools to understand the changing legal landscape.² Overlapping layers of sovereignty and legality, which derive from different spheres of government and evolve constantly, demand theoretical tools that account for the multi-level nature of normativity.³ Moreover, the erosion of national borders and the globalization of markets require a more complex taxonomy, which accounts for the growing role of the world *outside* of Europe. In particular, the economic and

² For a critical discussion of the new challenges facing comparative law, see Esin Örüçü and David Nelken, *Comparative Law: A Handbook* (Oxford: Hart, 2007).

³ This aspect will be discussed in Section IV on legal pluralism.

demographic growth of the African continent makes it inevitable for European scholars to confront it and to adapt the research tools accordingly.⁴ As Menski notes,

while non-Western legal systems and concepts have been systematically belittled over the past centuries, a side effect of globalization and of post-modernity is a notable current resurgence that legal systems beyond Europe need to be studied in their own right and have a legitimate place on the global tree of law.⁵

Within the realm of legal studies, comparative law "has served as a ministry of Foreign Affairs, establishing contacts and developing relations with legal scholars from other countries and cultures."⁶ The discipline has played a crucial role in mapping the legal world, whose borders have constantly expanded over time. However, in a context in which boundaries, borders, jurisdictions and traditions overlap, the mapping role of comparative law becomes particularly difficult.⁷ Born as a European-centered discipline, in which the families of continental civil and common law exhausted the domain of comparable items, comparative law has been forced to face the challenge of understanding and explaining other legal systems that are based on different foundations. This challenge, which will be explored in Section IV, is intertwined with the prolific literature on legal pluralism that acknowledges the existence of multiple legal orders and disconnects the dominant binomial between State and law.

This binomial, i.e., the overlap between State and law that derived from formalistic theories of law⁸ and provided the theoretical foundations to comparative legal studies, was one of the obstacles to the expansion of comparative law itself. As regards non-European legal systems and their customary components, this equivalence

⁴ On growth in sub-Saharan Africa, see for example: Yoonyoung Cho and Bienvenue N. Tien, *Sub-Saharan Africa's Recent Growth Spurt: An Analysis of the Sources of Growth* (Washington D.C.: World Bank, 2014)

⁵ Werner Menski, "Beyond Europe," in *Comparative Law: A Handbook* ed. Esin Örüçü and David Nelken (Oxford: Hart Publishing, 2007), 189.

⁶ William Twining, "Globalisation and Comparative Law," in *Comparative Law: A Handbook* ed. Esin Örüçü and David Nelken (Oxford: Hart, 2007), 77.

⁷ *Ibid.*, 71.

⁸ For a critical analysis of the concept of legal order and the identity between state and law, see Carla Faralli, "Vicende Del Pluralismo Giuridico. Tra Teoria Del Diritto, Antropologia E Sociologia," *Sociologia del diritto* (1995). This point will be developed in the following Section.

entailed that European legal scholars did not qualify these experiences as legal, but rather as cultural manifestations. The study of these traditions was therefore left mostly to anthropologists, who conducted empirical research on tribal societies and their system of beliefs and rules. Within the colonial context, anthropological research flourished⁹ – often at the service of colonizing powers. Colonial governments promoted field research to advance their understanding of local cultures and ensure a better control over the territory thanks to the use of local customs, which were collected and reinterpreted.

Outside the anthropology domain, European comparative lawyers neglected the study of legal systems like the sub-Saharan one for a long time and only reached a better understanding of them over the past 30 years. In this sense, Menski rightly argues that

law beyond the Bosforus and Gibraltar, and similarly beyond the Mexican border, is still little known among Western scholars, who tend to have outdated perceptions of what laws the people of these Southern regions actually follow. These are a vast majority of today's world population, mainly brown and black people, with their own laws, partly transplanted from the North, but by no means just inferior copies of Western legal systems. Legal scholarship has not yet overcome centuries of Euro-centric legal study assuming that Enlightenment and legal theory were produced – and are owned, by the West.¹⁰

This “serious deficiency of plurality-consciousness in understanding non-Western laws”¹¹ entails that comparative law students did not easily acknowledge African law as “proper law.”

The taxonomies elaborated by comparative lawyers in order to categorize legal systems provide a clear illustration of this point. Most of the literature in comparative law has focused on legal taxonomies and, as Husa noted, “for some comparatists,

⁹ See for example the work of the Adat school in the Netherlands, founded by Van Vollenhoven.

¹⁰ Menski, “Beyond Europe,” 190.

¹¹ *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (Cambridge: Cambridge University Press, 2006), 380.

classifying and grouping legal families is the hallmark of scientific comparative law."¹² Within the extensive literature on this topic, it is sufficient here to recall the two classifications that are generally considered the most influential ones: the one by René David and the one by Konrad Zweigert and Hein Kotz.¹³

David¹⁴ classified legal systems on the basis of the legal method and the foundation of the social order and hence identified four legal families: Roman-Germanic, socialist, common law, and “other conceptions of social order and law”¹⁵ based on religion and philosophy. David’s residual category encompassed most extra-European experiences such as Islamic, Hindu, Chinese, and African law, thus denying autonomy to the African experience. Furthermore, this classification seemed to suggest a somewhat skeptical view on the existence of *proper* law outside the realm of the Romanic-Germanic, socialist and common law families. Inevitably, David's model has been criticized for its Euro-centric focus and for its insight only on Western legal families:¹⁶ although David was not equating all the different non-European systems and acknowledged the differences between them, he still considered them part of the same residual category, within which the foundations of social orders are based on philosophical or religious conceptions.

The classification proposed by Kweigert and Kotz initially distinguished between seven legal families: Romanistic, Germanic, Nordic, Anglo-American,

¹² Yaakko Husa, "Family Affair - Comparative Law's Never Ending Story?," *Annuario di diritto comparato* (2013): 26.

¹³ The literature on legal families is extensive. For an overview of the studies on taxonomy, see Gilles Cuniberti, "La Classification Des Systèmes Juridiques - Taxinomie, Enseignement Et Avancée De La Connaissance," *Annuario di diritto comparato* (2013).

¹⁴ René David, *Les Grands Systèmes De Droit Contemporains* (Paris: Dalloz, 1964).

¹⁵ Author's translation.

¹⁶ See for example: Jaques Vandelinden, "A Propos Des Familles De Droit En Droit Civil Comparé," in *Hommages À R. Dekkers* (Bruxelles: Bruylant, 1982).

socialist, Far Eastern, and religious.¹⁷ This taxonomy, which has been defined as "the macro-comparative paradigm during the last decade of the 20th century,"¹⁸ was based on key criteria that included historical development, legal thinking, legal institutions, sources of law and underlying ideology. However, the same authors successively revised their position and focused only on Western legal families, i.e., on Roman, Germanic, Nordic, and common law systems.¹⁹ Moreover, these authors acknowledge the historically determined character of legal taxonomies and argue that

it is possible for a quite new legal family to emerge as time goes by, and we may at the moment be approaching the time when the systems of sub-Saharan Africa should be classed together as an African legal family.²⁰

These taxonomies have been defined as "largely Euro-American centric" and have been blamed for their inability to explain a changed "geo-legal map of the world."²¹ In both David's and Kweigert-Kotz's classifications, the legal systems outside of the European continent were either subsumed under the European family or treated as "mere appendices."²² This underplayed the specificities of those legal systems and, with regards to African law, it contributed to the lack of legal studies on the customary law of the continent. In particular, the diverse set of customary institutions created across Africa has often been overlooked by legal students: lawyers concerned with law in Africa rather focused on the civil/common law tradition and traced the characteristics of the systems back to the legal family of the colonizing powers.

¹⁷ Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, Second ed. (Oxford: Clarendon Press, 1992).

¹⁸ Yaakko Husa, "The Future of Legal Families," Oxford Handbooks Online, <http://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199935352.001.0001/oxfordhb-9780199935352-e-26>. Accessed 4 March 2017.

¹⁹ Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, Fifth ed. (Oxford: Clarendon Press, 1998).

²⁰ *Ibid.*, p. 66. The authors emphasize that "one's division of the world into legal families and the inclusion of systems in a particular family is vulnerable to alteration by historical development and change. So in the theory of legal family much depends on the period of time of which one is speaking" (*ibid.*, p. 67).

²¹ Ugo Mattei, "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems," *American Journal of Comparative Law* 45, no. 5 (1997): 10.

²² Husa, "Family Affair - Comparative Law's Never Ending Story?," 27.

The independence of African states increased the scholarly attention on African law and over time, thanks to the research on legal pluralism and to the contributions of anthropological and sociological research, scholars agreed that customary institutions elaborated in the continent have binding force and are not a mere collection of *social* norms, but a set of proper *legal* rules.²³ Some authors write of “African law,”²⁴ others of “African laws,”²⁵ whereas others include the legal experiences in the African continent within broader categories²⁶ - but the study of African legal institutions is now an integral part of the discipline of comparative law.

A remarkable effort in outlining the complexity and specificity of African law was made by Sacco, whose comparative approach focuses on “legal formants,”²⁷ i.e., on the various elements that contribute to the creation of legal rules through their dynamic interaction. Sacco focused on the interaction between the internal components (“formants”) of every legal system and noted that legal rules emerge from the dynamics, sometimes conflicting, between these elements. In his research on African law, Sacco stated that “Africa as studied by the comparative lawyer is smaller than Africa measured by the geographer.”²⁸ While acknowledging the multiplicity of legal models over the continent, he identified some shared characteristics in the sub-Saharan region, the legal models of which he classified as “African law.”²⁹

²³ For an overview of this development in the literature, see: Rodolfo Sacco et al., *Il Diritto Africano*, ed. Rodolfo Sacco, Trattato Di Diritto Comparato (Torino: UTET, 1995).

²⁴ Rodolfo Sacco, “The Sub-Saharan Legal Tradition,” in *The Cambridge Companion to Comparative Law*, ed. Mauro Bussani and Ugo Mattei (Cambridge: Cambridge University Press, 2012).

²⁵ Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (emphasis added).

²⁶ Interesting is the systematization proposed by Patrick Glenn, who refers to African law as part of the “chthonic tradition,” which includes all the legal systems where “people... live an ecological life by being chthonic, that is, by living in or in close harmony with the earth” (*Legal Traditions of the World. Sustainable Diversity in Law* (Oxford: Oxford University Press, 2004), 60).

²⁷ Rodolfo Sacco, “Legal Formants: A Dynamic Approach to Comparative Law,” *American Journal of Comparative Law* 39, no. 1 (1991).

²⁸ “The Sub-Saharan Legal Tradition,” 313.

²⁹ The same geographical boundaries for African law are adopted by Menski (*Comparative Law in a Global Context: The Legal Systems of Asia and Africa*).

In sub-Saharan legal systems, Sacco identified five “layers” of norms created over time by different actors. By means of a stratigraphic approach, he categorized norms as customary, religious, colonial, post-colonial, and contemporary.³⁰ In a recent work, he reduced the analysis of layers to four, namely: traditional, religious, colonial and post-independence.³¹ A similar stratigraphic approach has been adopted by Menski, who structured his analysis of African laws by distinguishing between traditional, colonial and postcolonial law.³² In Menski’s account, the religious layer is missing and its influence is only acknowledged in the North of the continent.

According to Sacco, the various layers of law should be analyzed both separately and jointly, in order to appreciate their dynamic interaction. This approach has been followed by many authors who have studied African legal regimes by comparing formants and layers, as well as by highlighting the overlaps and conflicts between them.³³ As the second part of this Chapter will elaborate, this approach has informed the empirical research and the analysis of the legal sources applicable to land investments in Ghana and Zambia.

III. Customary Law: A Review of the Concept

This complex stratigraphic approach has been defined as “the most appropriate research method for the study of law in African countries”³⁴, as it allows for a deeper analysis of the traditional layer of law. This layer of law and its characteristics will be discussed in

³⁰ Sacco et al., *Il Diritto Africano*.

³¹ Sacco, Rodolfo, “The Sub-Saharan Legal Tradition.”

³² Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*.

³³ See for example: Elisabetta Grande, ed. *Transplants, Innovation and Legal Tradition in the Horn of Africa* (Torino: L’Harmattan, 1995); Marco Guadagni, *Il Modello Pluralista*, ed. Antonino Procida Mirabelli Di Lauro, *Sistemi Giuridici Comparati* (Torino: Giappichelli, 1996); Salvatore Mancuso, *Terra in Africa: Diritto Fondiario Eritreo* (Trieste: Edizioni Universitarie Trieste, 2013).

³⁴ Mancuso, *Terra in Africa: Diritto Fondiario Eritreo*, 11 (Author’s translation).

this Section, together with the problematic issues that have been emphasized in the literature.

African customary law, whose formation and evolution is not insulated from political and economic change, is the product of local practices that reflect a society not centered on state authority. As noted by many authors,³⁵ its influence is not receding; it has been reported that

in Sierra Leone... approximately 85 percent of the population falls under the jurisdiction of customary law... [and] customary tenure covers 75 percent of land in most African countries, affecting 90 percent of land transaction in countries like Mozambique and Ghana.³⁶

Customary law appears to have a crucial role in regulating the livelihood of rural populations in sub-Saharan Africa, and it becomes even more important in “post-conflict countries, failing states, and states with no formal functioning government.”³⁷

However, as noted by Tobin,

customary law has excited little interest among legal experts.... The lack of attention for customary law [is] striking [but] the situation is changing rapidly with an ever-increasing body of research and literature on a wide range of legal issues.³⁸

In the framework of this research, a better understanding of its functioning is needed to shed light on the problem being investigated.

There is no agreement in the literature on the definition of customary law, nor on the use of the expression “customary law”: some authors prefer the use of “traditional

³⁵ See for example: Gordon R. Woodman, Ulrike Wanitzek, and Harald Sippel, eds., *Local Land Law and Globalization: A Comparative Study of Peri-Urban Areas in Benin, Ghana and Tanzania* (Münster Lit Verlag, 2006); Jeanmarie Fenrich, Paolo Gallizzi, and Tracy E. Higgins, *The Future of African Customary Law* (Cambridge: Cambridge University Press, 2013); Leon Shaskolsky Sheleff, *The Future of Tradition: Customary Law, Common Law, and Legal Pluralism* (F. Cass: London, 2000).

³⁶ Leila Chirayath, Caroline Mary Sage, and Michael J. V. Woolcock, "Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems," in *Background Paper, World Development Report* (New York: World Bank, 2005). Similar data is reported in: Brendan Tobin, *Indigenous Peoples, Customary Law and Human Rights: Why Living Law Matters* (Oxford: Routledge, 2015).

³⁷ Tobin, *Indigenous Peoples, Customary Law and Human Rights: Why Living Law Matters*.

³⁸ *Ibid.*, 5.

law”³⁹ or “tribal law”⁴⁰, whereas others, as this Section will elaborate, find the notion of customary law misleading and argue that it is the product of colonization.⁴¹ In this Section, the key characteristics of customary law, as identified by African law scholars, will be outlined. From this analysis it will be clear that these intrinsic characteristics contributed to the lack of understanding by European jurists who, as discussed in the previous Section, did not easily acknowledge customary law as a fully-fledged system of binding rules. Moreover, the fact that customary law has been studied mostly in opposition to state law contributed to masking the similarities between the two, in particular the binding nature of customary law.⁴² This Section will also outline the limitations of the concept of customary law and the critiques put forward in the literature, which have informed the empirical research.

First of all, customary law is not written but is rooted in an oral tradition.⁴³ The lack of written texts poses serious challenges to Western researchers interested in the local customary law, as the research tools available will be limited to the observation of legal practices and interviews. As noted by Sacco, this entails that

anthropological methodology is needed to study and understand traditional Africa, both for practical research and conceptual organization. It is impossible to distinguish between the legal anthropologist and the “Africanist” jurist interested in the investigation of the traditional layer.⁴⁴

³⁹ Guadagni, *Il Modello Pluralista*.

⁴⁰ Jackson B. Ojwang, "The Meaning, Content and Significance of Tribal Law in an Emergent Nation: The Kenya Case," *Law and Anthropology* 4 (1989).

⁴¹ Sara Berry, *No Condition Is Permanent: The Social Dynamics of Agrarian Change in Sub-Saharan Africa* (Madison, Wisconsin: University of Wisconsin Press, 1993); Martin Chanock, "Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform," *International Journal of Law and the Family* 3 (1989).

⁴² Tobin, *Indigenous Peoples, Customary Law and Human Rights: Why Living Law Matters*, 6.

⁴³ Not all the scholars agree on this aspect. In particular, Sacco speaks of “mute law” and notes that “more recently, it has been clarified that the term ‘orality’ is not accurate: the lack of precise formulation and verbalization of African traditional rules is more important than the lack of missing written formulation” (“The Sub-Saharan Legal Tradition,” 315).

⁴⁴ *Ibid.*, 314.

The oral dimension of customary law entails that both the transmission of law and its transformation are not written.⁴⁵ This allows for more adaptability to changes in the social and economic context: a customary rule may more easily be modified and respond to the needs of the related community.⁴⁶ During the colonial period, the oral nature of customary law clashed with the tendency imposed by the foreign rulers to codify customs.⁴⁷ The codification of customary law is in itself an oxymoron and, as will be discussed later in this Section, according to some authors it has substantially altered the foundations of customary law, making it static and resistant to change.⁴⁸

Woodman, quoting the work of Allot, clarifies in this sense that

once customary law has been codified or settled by judicial decision, its binding force depends on the statute or the doctrine of the precedent; in short, it ceases to be customary law.⁴⁹

Secondly, customary law is context-related. As Guadagni noted, “traditional law is not uniform within the same country, but it varies across groups and areas.”⁵⁰ These variations are significant and encompass arrangements that, by means of example, may vary from patriarchal to matriarchal systems. Sacco estimates that the variety of customary laws in the African continent includes more than eight thousand systems⁵¹ – a trait which may discourage the foreign researcher interested in the study of customary law.

Thirdly, customary law is deeply linked to the sacred sphere, which constitutes one of its key components. The sacredness of customary law is one of the main sources

⁴⁵ Guadagni, *Il Modello Pluralista*, 39.

⁴⁶ Berry, *No Condition Is Permanent: The Social Dynamics of Agrarian Change in Sub-Saharan Africa*.

⁴⁷ A thorough discussion of the colonial approach to customary law is beyond the scope of this work. However, a historical analysis of land law that covers the colonial period as well is provided in chapters 3 and 4 with regards to Zambia and Ghana. For a theoretical analysis of the impact of colonialism on customary systems, see: Mahmood Mamdani, *Citizen and Subject. Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 1996).

⁴⁸ Chanock, "Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform."

⁴⁹ Gordon R. Woodman, "Some Realism About Customary Law - the West African Experience," *Wisconsin Law Review* 128 (1969).

⁵⁰ Guadagni, *Il Modello Pluralista*, 36.

⁵¹ Sacco et al., *Il Diritto Africano*, 61.

of legitimacy surrounding customary power, which explains why in sub-Saharan Africa chieftaincy is vested with both power and sacredness.⁵² This supernatural dimension legitimizes customary law and dictates its respect within the community – a trait which is difficult to understand for Western jurists, who consider the separation between religion and State (and therefore, law) as a key principle.

Fourthly, the relationship between the individual and community within customary law is such that the latter takes precedence: as Guadagni wrote, “the rights of individuals are subordinate to the rights of the group.”⁵³ Moreover, the system of individual rights varies depending on the personal status and on the position occupied within the groups, and it is limited by obligations of the individual towards the community.⁵⁴ Consequently, the social order may be described as “communitarian”, as opposed to “individualistic” – and as such different from the one dominant in the Western world.⁵⁵ As Sacco wrote, “the human being is not the sole entity to have rights. Besides them, ancestors could have rights, as can supernatural entities and natural things such as plants.”⁵⁶ Moreover, future generations are also bearers of rights that contribute to limiting the rights of individuals.⁵⁷

Lastly, another important—although controversial⁵⁸—characteristic of customary law is its bottom-up nature, in that an external or superior authority does not create it, but that it rather originates from the same community that it addresses.⁵⁹ This

⁵² Mitzi Goheen, "Chiefs, Sub-Chiefs and Local Control: Negotiations over Land, Struggles over Meaning," *Africa: Journal of the International African Institute* 62, no. 3 (1992). This aspect will be analyzed in more detail in chapters 3 and 4 with respect to the role of chiefs in land management in Ghana and Zambia.

⁵³ Guadagni, *Il Modello Pluralista*, 41.

⁵⁴ Max Gluckman, *Custom and Conflict in Africa* (Oxford: Oxford University Press, 1955); C.K. Meek, *Land Law and Custom in the Colonies* (Oxford: Oxford University Press, 1946).

⁵⁵ Sacco, "The Sub-Saharan Legal Tradition," 316.

⁵⁶ *Ibid.*

⁵⁷ Meek, *Land Law and Custom in the Colonies*.

⁵⁸ The bottom up nature of customary law has been widely criticized in the literature, as the next paragraph will discuss.

⁵⁹ Guadagni, *Il Modello Pluralista*, 40.

characteristic does not deny the existence of chiefs in customary societies, since their presence does not subtract the coercive power from the community that they are leading,⁶⁰ but it acknowledges the central role of communities in the production of norms.

The abovementioned traits of customary law have been sharply criticized in the literature. It is worth mentioning the analysis done by Chanock, who traces the origin of customary law back to the impact of colonial domination and to its political use of tradition.⁶¹

In his work, he starts from the acknowledgement that the arrival of European powers in Africa demanded the administration of large areas with relatively small bureaucratic structures and limited awareness of native legal institutions. Chanock argues that the empowerment of local chiefs and the recognition and codification of customary norms by colonial authorities *created* a new layer of “traditional” norms.⁶² This approach emphasizes that colonial powers understood local traditions by means of European interpretative tools. In his view, customary law would therefore be a product of political authority and not a genuine expression of “what people actually did.”⁶³ As such, he is critical of one of the key traits that legal scholars generally ascribe to customary law, i.e., its bottom-up nature.

Chanock’s critique to the idealized vision of customary law emphasizes the importance of power relations in shaping and enforcing norms: as he contends,

the terms law, custom and customary law have become loaded with a variety of meanings and implications. In the African context there has been a tendency to use custom and customary law as expressive of a long-lived and homogeneous value system which represented what people actually did. As a consequence the

⁶⁰ *Ibid.*

⁶¹ Chanock, "Neither Customary nor Legal: African Customary Law in an Era of Family Law Reform"; "Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure," in *Law in Colonial Africa* ed. Kristin Mann and Richard Roberts (Portsmouth, NH: Heinemann, 1991).

⁶² Chanock focuses on British colonies, where indirect rule was enforced (*ibid.*).

⁶³ Chanock, "Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure," 74.

customary is seen as in some way egalitarian or at least acceptable to people as a whole, while the state's law, in contrast, as an oppressive imposition from outside.... But it is important to remember that custom is not simply what people do; that is a set of values expressive not simply of communal life, but a way of maintaining order and relations of power.⁶⁴

As such, Chanock's approach aims to re-politicize customary law and highlight the asymmetries of power found in local communities, which are often overlooked in the research.

Another important critique to the alleged bottom-up nature of customary law may be found in the work of the historian Ranger, who focuses on the impact of colonialism and the codification of native customs. He notes that

at a certain point [traditions] had to stop changing; once the 'traditions' relating to community identity and land rights were written down in court records and exposed to the criteria of the invested customary model, a new unchanging body of tradition had been created.⁶⁵

In his view, colonialism had an inevitable impact on the shaping and eventual rigidifying of customary norms. As such, customary norms would ultimately end up a product of state authority, rather than a bottom-up creation.

A different critique to the concept of customary law as an autonomous legal category has been put forward by the agrarian historian Berry.⁶⁶ The author contends that more attention should be paid to the interactions between customary law and state law, which represent a major factor of legal change. In her work on British colonies, Berry argues that customs always remained contested and were not rigidified nor created by colonial intervention: "traditions did not necessarily stop changing when versions of them were written down, nor were debates over customs and social identity

⁶⁴ *Ibid.*

⁶⁵ Terence Ranger, "The Invention of Tradition in Colonial Africa," in *The Invention of Tradition*, ed. Eric Hobsbawm and Terence Ranger (Cambridge: Cambridge University Press, 1983), 251. On the invention of tradition, see also: Francis G. Snyder, "Colonialism and the Legal Form: The Creation of 'Customary Law' in Senegal " *Journal of Legal Pluralism* 19 (1981).

⁶⁶ Berry, *No Condition Is Permanent: The Social Dynamics of Agrarian Change in Sub-Saharan Africa*.

resolved, either during the colonial period or afterwards.”⁶⁷ In her view, customary law interacts constantly and in many ways with state law, so that these two cannot be understood as insulated and distinct bodies of law.

As the next Section will discuss, a very similar position has been translated into comparative legal theory by the literature on legal pluralism. This literature, which forms part of the theoretical foundations of this work, has evolved to include customary law found in extra-European systems as legitimate structures of law. This critical analysis has contributed greatly to the expansion of the scope of legal studies.

IV. Legal Pluralism in the Literature

Legal Pluralism as a Response to Legal Positivism

The acknowledgement of custom as an autonomous source of law and the study of its interaction with state norms entail that the positivistic paradigm of legal reasoning centered on state authority fails to explain legal reality. In positivistic legal theory, the definition of law has been firmly coupled with that of the modern State. In line with an understanding of the State as the prominent institution that guarantees social order and as the supreme authority over the territory, law has been influentially defined as the command of the sovereign backed by a sanction.⁶⁸ It is within this theoretical framework that state law gained prominence and came to be regarded as the only and “most important form of law.”⁶⁹

The development of legal pluralism as a theory and as an approach to law is intrinsically related to the affirmation of legal positivism and of state law. Starting from the early 20th century, the Austinian paradigm centered on the state has been questioned

⁶⁷ *Ibid.*, 8.

⁶⁸ John Austin, *Lectures on Jurisprudence, or the Philosophy of Positive Law* (London J. Murray, 1879).

⁶⁹ William Twining, "Normative and Legal Pluralism: A Global Perspective," *Duke Journal of Comparative and International Law* 20 (2010): 499.

by many authors who set forward anti-formalistic theories and reclaimed the centrality of society in the creation of law, by arguing that “the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.”⁷⁰ In a long theoretical debate that has involved sociologists, anthropologists, and legal scholars, the question of “whether or not law should be conceptually bound to the political organization of the State”⁷¹ has been thoroughly challenged: starting from early ethnographic works that showed the existence of binding norms in the absence of state institutions,⁷² the legal nature of social norms and of customs has been increasingly acknowledged and the scope of legal studies has been broadened.⁷³ As such, legal pluralism represent an expansion of the realm of normativity so as to include a variety of social phenomena that, as mentioned above, are not “conceptually bound to the political organization of the State.”⁷⁴ In this context, it is important to mention the seminal work on institutions and legal order of Hauriou⁷⁵ and Romano⁷⁶ in the early 20th century. Both the authors emphasized the interconnectedness between norms and the societies in which these are created. For example, Romano defined international law and canon law as legal orders in their own right, whose legitimacy does not derive from the recognition of the State.⁷⁷

⁷⁰ Eugen Herlich, *Fundamental Principles of the Sociology of Law* (Cambridge, MA: Harvard University Press, 1936), Foreword. For a review of this anti-formalistic literature, see: Faralli, "Vicende Del Pluralismo Giuridico. Tra Teoria Del Diritto, Antropologia E Sociologia."

⁷¹ Franz Von Benda-Beckmann, "Pak Dusa's Law: Thoughts on Law, Legal Knowledge and Power," *Journal of Transdisciplinary Environmental Studies* 4, no. 2 (2005): 2.

⁷² The seminal work in this sense is that of Malinowski (*Crime and Custom in Savage Society* (London: Routledge, 1926), as this Section will discuss.

⁷³ For a review of the historical development of pluralist theory, see Faralli, "Vicende Del Pluralismo Giuridico. Tra Teoria Del Diritto, Antropologia E Sociologia".

⁷⁴ Von Benda-Beckmann, "Pak Dusa's Law: Thoughts on Law, Legal Knowledge and Power," 2.

⁷⁵ Maurice Hauriou, *Principes de droit public* (Paris, Dalloz, 1910).

⁷⁶ Santi Romano, *L'ordinamento giuridico* (Pisa, Edizioni Spoerri, 1917).

⁷⁷ Ibid.

The Contribution of Comparative Law

The discipline of comparative law has also been critically engaged in the effort to overcome the positivistic approach to law: as Legrand suggests, comparative law

historically emerged as a reaction against the ever-increasing sterility of positive law studies and from the conviction that positive law alone no longer sufficed to give a satisfactory idea of the legal reality or of the world.... [and] it stands today... as a testimony to the decadence of legal etatism.⁷⁸

By increasingly looking at legal systems outside Europe, comparative law has contributed to “deparochializing” law⁷⁹ and to showing how

an understanding of law that is narrowly focused on state law and on national legal systems is therefore too rigid, insufficient particularly for understanding how Asian and African legal systems operate.⁸⁰

As such, comparative law compels legal scholars “to take account of social facts and factors more explicitly than ha[d] so far been done.”⁸¹

Moreover, Sacco’s approach of “legal formants”⁸² has contributed to the deconstruction of the myth of unity and coherence of legal systems. As briefly mentioned in Section II, Sacco conceived of every legal system as composed of various formants, which are bodies of rules that have different sources (i.e., legislative, jurisprudence, case-law formant, and customary formants). By looking at formants, jurists can identify the contradictory reality of legal norms and therefore overcome the assumption of legal uniformity. As he wrote,

instead of speaking of ‘the legal rule’ of a country, we must speak instead of the rules of constitutions, legislatures, courts, and indeed, of the scholars who formulate legal doctrine. The reason jurists so often fail to do so is that their thought is dominated by a fundamental idea: that in a given country at a given moment the rule contained in the constitution or in legislation, the rule formulated by scholars, the rule declared by courts, and the rule actually enforced by courts, *have an identical content and are therefore the same*. Within a given legal system, the jurists assume this unity. Their main goal is to discover ‘the legal rule’ of their system.... The jurist concerned with the law within a

⁷⁸ Pierre Legrand, “Beyond Method: Comparative Law as a Perspective,” *American Journal of Comparative Law* 36, no. 4 (1988): 789.

⁷⁹ Twining, “Globalisation and Comparative Law,” 72.

⁸⁰ Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 108.

⁸¹ *Ibid.*

⁸² Sacco, “Legal Formants: A Dynamic Approach to Comparative Law”.

single country examines all of these elements and then eliminates the complications that arise from their multiplicity to arrive at one rule. He does so by a process of interpretation. Yet this process does not guarantee that there is, in his system, only a single rule. Several interpretations will be possible and logic alone will not show that one is correct and another false. Within a given legal system with multiple 'legal formants' there is *no guarantee that they will be in harmony rather than in conflict.*"⁸³

By focusing on the interaction between formants and emphasizing the presence of contradictions and tensions, Sacco added complexity and dynamism to legal comparison. Thus, his structuralist approach to comparative law offered a thoughtful "global internal critique of the legal discourse"⁸⁴ based on the positivistic paradigm.

Legal Pluralism and its Development

Legal pluralism has been defined as "the new paradigm, as far as the social scientific study of law is concerned."⁸⁵ The following paragraphs aim to provide an overview on this literature and its development. As already mentioned, the concept of legal pluralism has been elaborated within different fields of literature and disciplines, which include sociology, anthropology, philosophy of law, and comparative law. Moreover, as Vanderlinden argues, there are as many versions of legal pluralism as scholars who worked on it.⁸⁶ As such, mapping the literature across all these disciplines could well be the object of a fully-fledged doctoral research. The scope of this Section is thus not to review all the cross-disciplinary contributions to the topic, but rather to highlight the ones that are relevant to the object of this research, at the same time providing a general overview on the development of legal pluralist theories.

⁸³ *Ibid.*, 21-23.

⁸⁴ Pier Giuseppe Monateri, "Methods in Comparative Law: An Intellectual Overview," in *Methods of Comparative Law*, ed. Pier Giuseppe Monateri (Northampton - MA: Edward Elgar Publishing, 2012), 23.

⁸⁵ John Griffiths, "Legal Pluralism and the Theory of Legislation — with a Special Reference to the Regulation of Euthanasia," in *Legal Polycentricity: Consequences of Pluralism in Law*, ed. Hanne Petersen and Henrik Zahale (Hants: Dartmouth Publishing Company, 1995), 201.

⁸⁶ Jacques Vanderlinden, "Return to Legal Pluralism: Twenty Years Later," *Journal of Legal Pluralism* 28 (1989).

Legal pluralism can be defined as the coexistence of multiple laws and legal systems in the same geographical space.⁸⁷ Its introduction into legal scholarship grew out of the effort to overcome “legal etatism.”⁸⁸ Moreover, legal pluralism challenges positivist conceptions of law that traditionally emphasize the practical or conceptual separation of state law from other normative contexts. A product of legal, sociological, and anthropological contributions,⁸⁹ it refers to the “normative heterogeneity”⁹⁰ that characterizes every legal system. Thanks to its acknowledgement of multiple sources of normativity, legal pluralism allows for a better understanding of globalization and its legal implications: as Davies noted,

with the decline of nation states as the locus of political and legal power, it seems inevitable that traditional state-centered legal philosophy must give way to a different paradigm which recognizes the plurality of law.⁹¹

As mentioned above, its development may be traced back to the work of Malinowski and his universalist conception of law. In his work on the Trobriand Islands, the anthropologist came to the understanding that non-state norms were equally binding on individuals. As such, he included in the definition of law *all* the bodies of binding obligations impacting on the community, and not only those traditionally considered as legal and deriving from state authority. As remarked by Davies, this perspective broadened the scope of law and at the same time highlighted the coexistence of different sources of law within society:

Once law was more widely defined in such a way, it became possible to perceive non-state law in situations where there was no recognizable State but also in

⁸⁷ Margaret Davies, "Legal Pluralism," in *The Oxford Handbook of Empirical Legal Research*, ed. Peter Cane and Herbert M. Kritzer (Oxford: Oxford University Press, 2010).

⁸⁸ Legrand, "Beyond Method: Comparative Law as a Perspective."

⁸⁹ For critical reviews of the notion of legal pluralism, see: Davies, "Legal Pluralism."; Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*; Brian Z. Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global," *Sydney Law Review* 30 (2008).

⁹⁰ John Griffiths, "What Is Legal Pluralism?," *Journal of Legal Pluralism* 2 (1986): 38.

⁹¹ Davies, "Legal Pluralism," 829.

situations where in the same geographical space a State offered a different type of law.⁹²

Following the seminal work of Malinowski, more and more anthropologists and sociologists started studying legal pluralism, especially within European colonial territories. Merry noted that,

as [they] documented the rich variety of social control, social pressure, custom, customary law, and judicial procedure within small-scale societies, these anthropologists gradually realized that colonized people had both indigenous law and European law. Colonial law was reshaping the social life of these villages and tribes in subtle ways, even when it seemed remote.... Tribes and villages had some law developed over the generations on to which formal rational law was imposed by the European colonial powers... Scholars termed these situations legal pluralism.⁹³

Within legal scholarship, legal pluralism became “academically recognized”⁹⁴ through the work of Hooker,⁹⁵ who also focused on the colonial context and looked at the way in which colonial law interacted with customary law, by focusing on the transplants of European laws in the colonies. In his research, Hooker looked at pluralism and at the way in which the colonial states managed legal diversity and regulated the coexistence of norms. Approximately in the same period, the study of legal pluralism started to expand its purview to the dynamics of Western societies.⁹⁶ It is important to recall the work of Moore, who provided a sociological study of legal pluralism in contemporary America and compared it to the one she researched in Tanzania, thus showing the ubiquitous nature of the phenomenon. Moore identified the pattern of norms regulating the clothing industry in New York, both official and unofficial, and analyzed the

⁹² *Ibid.*, 807.

⁹³ Sally Merry Engle, "Legal Pluralism," *Law & Society Review* 22, no. 5 (1988): 869.

⁹⁴ Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 87. In the same Chapter, Menski suggests that the “plurality-consciousness” can be traced back historically to the work of Bodin, Montesquieu and Bentham.

⁹⁵ M.B. Hooker, *Legal Pluralism. An Introduction to Colonial and Neo-Colonial Law* (Oxford: Clarendon Press, 1975).

⁹⁶ See for example: Hooker, *Legal Pluralism. An Introduction to Colonial and Neo-Colonial Law*; Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study," *Law & Society Review* 7, no. 4 (1973).

interaction between them. She defined each of these bodies as a “semi-autonomous social field,” i.e.:

A small field observable to an anthropologist [that can] be chosen and studied... can generate rules and customs and symbols internally, but... is also vulnerable to rules and decisions and other forces emanating from the larger world by which it is surrounded. The semi-autonomous social field has rule-making capacities, and the means to induce or coerce compliance⁹⁷

Her work for the first time connected the study of Western societies with that of customary societies in Africa and showed by means of powerful examples how these two shared the same “analytical problem.”⁹⁸ By defining the social fields as semi-autonomous, she highlighted the interdependence between them and the way in which they are reciprocally influenced; many contemporary legal scholars interested in legal pluralism, as this Section will discuss, have emphasized this characteristic. However, the work of Moore did not go as far as defining these social fields as legal orders, but distinguished state law from the other social fields – thus partly preserving the hierarchy of norms posited by legal positivism.

A significant impact in the literature on legal pluralism was made by Griffiths, who in 1986 wrote a seminal article on this concept in a journal specifically dedicated to the topic – The Journal of Legal Pluralism. In this famous article, written “when legal pluralism as a concept among lawyers was still in its infancy,”⁹⁹ Griffiths adopted Moore’s definition of legal pluralism as “the presence in a social field of more than one legal order”¹⁰⁰ and argued strongly that legal centralism is a myth, an ideal, a claim, an illusion,” whereas, on the contrary, legal pluralism “is the *fact*.”¹⁰¹ The author criticized

⁹⁷ Falk Moore, “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study,” 720.

⁹⁸ Falk Moore, “Changing African Land Tenure: Reflections on the Incapacities of the State,” *European Journal of Development Research* 10, no. 2 (1998).

⁹⁹ Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 113.

¹⁰⁰ Griffiths, “What Is Legal Pluralism?,” 1.

¹⁰¹ *Ibid.*, 4.

the “legal centralist conception” —to which he also referred to as an “ideology”¹⁰²— according to which law is exclusively a prerogative of the State. Moreover, he was critical of the approach that sees law as hierarchically ordered and systematic and argues to the contrary that legal orders clash and “legal reality is... an unsystematic collage of inconsistent and overlapping parts.”¹⁰³ As such, it is clear that his work aimed at dismantling the key tenets of legal positivism discussed above.¹⁰⁴

In his theorization of legal pluralism, Griffiths distinguished between a “weak” and “strong” form. Weak legal pluralism, which he also called pluralism “in a juridical sense,”¹⁰⁵ sees the coexistence within the same social field of different bodies of law, whose interaction is regulated by the law of the State. As an example of weak legal pluralism, Griffiths referred to the one discussed by Hooker in his work, i.e., to the pluralism in the colonial context, in which colonial law recognized the application of customary or religious law in specific fields of activities, such as family law. As such, weak legal pluralism does not depart from the primacy of state law, but it foresees that state law may allow different systems of law within its boundaries. On the contrary, Griffiths advocated for the understanding of legal pluralism in its strong form, which breaks away from positivism and recognizes multiple sources of authority that are legitimized independently from each other. Strong pluralism is in his view

a situation in which not all law is state law nor administered by a single set of state legal institutions, and in which law is therefore neither systematic nor uniform.¹⁰⁶

As such, strong legal pluralism is incompatible with legal positivism and with “legal etatism,”¹⁰⁷ as it rejects the idea that state law may incorporate plurality and at the same

¹⁰² *Ibid.*

¹⁰³ *Ibid.*, 38.

¹⁰⁴ Given its central role in legal theory, a discussion of the literature on legal positivism is beyond the scope of this work. The key work to which reference is made in this context is: Austin, *Lectures on Jurisprudence, or the Philosophy of Positive Law*.

¹⁰⁵ Griffiths, “What Is Legal Pluralism?,” 8.

¹⁰⁶ *Ibid.*, 5.

time it acknowledges that other sources of authority are as strong as the State in their own right.

The strong pluralist position set forward by Griffith offered a clear starting point to comparative legal scholarship concerned with the coexistence of different norms within societies. However, it suffered from a key theoretical limitation, which became a core problem of subsequent literature. In particular, Griffith theorized that the plurality of legal orders is a *fact*. This necessarily implies that the role of pluralist legal theory is *descriptive* rather than normative, in that the existence of legal pluralism would be an undeniable characteristic of the legal world or, as Griffiths calls it, “a fact.”¹⁰⁸ However, the descriptive acknowledgement of legal pluralism as a fact removes the politics of definition from it – and thus ignores the crucial role of the choice of boundaries of law within the theory. As Davies notes,

either law is defined exclusively by the State or it is not, but there is no universally satisfactory definition of law which will solve the uncertainty. One kind of definition gives us *monism as a fact* [emphasis added], while the others give us *pluralism as a fact* [emphasis added]¹⁰⁹

Precisely this “definitional stop”¹¹⁰ has been the object of much of the literature on legal pluralism and at the same time has exposed it to a wide range of criticism.¹¹¹ As noted by Twining,

it is fairly obvious that the main puzzles are to do with the what counts as “legal” (rather than what is plural) and that nearly all writing about legal pluralism adopts or presupposes a broad conception of law that extends beyond the “Westphalian Duo” of the municipal or domestic law of sovereign states and public international law conceived as dealing with relations between such states. So discussions about legal pluralism are, perhaps inevitably, drawn into long-standing concerns about problems of conceptualizing law.¹¹²

¹⁰⁷ Legrand, "Beyond Method: Comparative Law as a Perspective".

¹⁰⁸ Griffiths, "What Is Legal Pluralism?".

¹⁰⁹ Davies, "Legal Pluralism," 809.

¹¹⁰ Twining, "Normative and Legal Pluralism: A Global Perspective," 497.

¹¹¹ See for example: Brian Z. Tamanaha, "The Folly of the 'Social Scientific' Concept of Legal Pluralism," *Journal of Law and Society* 20, no. 2 (1993); Simon Roberts, "Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain," *Journal of Legal Pluralism* 42 (1998).

¹¹² Twining, "Normative and Legal Pluralism: A Global Perspective," 477.

Similarly, Davies noted that

legal pluralism is in many ways a deceptively simple idea; ‘deceptive’ in its simplicity because, essentially, as many others have noted, any straightforward claim that law ‘is’ plural (or singular for that matter) begs the question of what law is.¹¹³

As such, much of the literature on legal pluralism has focused on key theoretical aspects concerning normativity, legitimacy, and authority - which inevitably “belong to the general theory of norms rather than about the idea of pluralism.”¹¹⁴ The idea of plural law begs the question of the boundaries of law, its nature, and its very definition. After all, how should we go about defining the boundaries of law? How can we ensure that a pluralist definition of law does not include mere social patterns that lack legal force? As Shahar summarizes, these questions are more than legitimate:

If scholars are to study "populations that observe more than one body of law," they must first have a clear notion of what they are looking for — namely, what a "body of law" is.¹¹⁵

Contrary to this, in his review of legal pluralism, Menski suggested that these are “misleading questions”¹¹⁶ that obscure the pervasiveness of this phenomenon. However, as some authors noted, if law becomes a pervasive pattern of social relation, the risk is to “drown in legal pluralism”¹¹⁷ and to lose the meaning and scope of law, thus ignoring the different types of rules and the values that are present within societies.¹¹⁸

¹¹³ Davies, "Legal Pluralism," 817.

¹¹⁴ Twining, "Normative and Legal Pluralism: A Global Perspective," 479. For a review of this problem, see: Tamanaha, "The Folly of the ‘Social Scientific’ Concept of Legal Pluralism".

¹¹⁵ Ido Shahar, "State, Society and the Relations between Them: Implications for the Study of Legal Pluralism," *Theoretical Inquiries in Law* 9, no. 2 (2008): 419.

¹¹⁶ Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 82.

¹¹⁷ Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global," 393.

¹¹⁸ Anne Griffiths, "Legal Pluralism," in *An Introduction to Law and Social Theory*, ed. Reza Banakar and Max Travers (Oxford: Hart, 2002); Roberts, "Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain." The terrain of values and law is indeed overlapped in the work of some pluralist scholars. As an example, it is sufficient to quote this excerpt from Chiba's work, where he writes that “the whole structure of law of a people is not limited to the monistic system of state law as maintained by model jurisprudence in accordance with its methodological postulates. The whole structure of law as an aspect of culture should *include all regulations, however apparently different from state law, which the people concerned observe as law in their cultural tradition, including value systems* [emphasis added]; the very cultural identity of a people demands that we include all of them in a whole structure. Thus, the whole structure of law is

A pragmatic solution to the definitional dilemma has been set forward by Tamanaha, who claimed that no theoretical discussion on the nature of law or on its definition is required to look at the legal world as a plural reality.¹¹⁹ In his view, the definitional stop may be overcome by “accepting as ‘legal’ whatever was identified as legal by the social actors, as just described.”¹²⁰ The contextual definition of law is as such determined by the choices of the actors and their stance relating to the law. This definition inevitably influences the method to be used for research on legal pluralism, which cannot but include anthropological and sociological tools. This is because, as Tamanaha noted, “legal pluralism exists whenever social actors identify more than one source of ‘law’ within a social arena.”¹²¹ Such a definition of law, which sees the actors at the center, focuses on the way in which they engage with pluralism and as such emphasizes the characteristic of law as a dynamic process in which power asymmetries are at play.¹²²

Similarly focused on the role of the actors and on law as a process, is Santos, whose work may be defined as a post-modern approach to legal pluralism.¹²³ In his groundbreaking research conducted in the 1970s in Brazilian *favelas*, Santos studied unofficial rules of dispute resolution and showed how parallel systems of legality

plural, consisting of different systems of law interacting with one another harmoniously or conflictingly.” (Masaji Chiba, *Asian Indigenous Law: In Interaction with Received Law* (New York: Kegan Paul International, 1986), 4.

¹¹⁹ Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global".

¹²⁰ *Ibid.*, 397.

¹²¹ *Ibid.*

¹²² On this aspect, see Davies, "Legal Pluralism".

¹²³ In this respect, it is essential to quote his famous article: Boaventura De Sousa Santos, "Law: A Map of Misreading. Towards a Postmodern Conception of Law," *Journal of Law and Society* 14, no. 3 (1987). Within the limited scope of this research, it is impossible to make justice to the contribution to law and society scholarship brought about by Santos in his work on the law of the oppressed. Amongst his latest books are: Boaventura De Sousa Santos, *Towards a New Common Sense: Law, Globalization, and Emancipation* (London: Butterworths, 2002); *Epistemologies of the South* (London: Routledge, 2014).

existed alongside the official state one.¹²⁴ Expanding the geographical focus of his research to Africa as well, Santos argued that the coexistence of several laws in one domain does not entail that each body of law is autonomous and independent from the other.¹²⁵ To the contrary, he looked at the interplay of legal orders and at the interactions between them. By focusing on them, Santos intended to shed light on the power dynamics that influence and shape the application of norms and to identify the patterns of legal change that derive from “hybridization,” i.e., from the interaction between legal orders. As he clarified,

whereas in colonial society it was easy to identify the legal orders and their spheres of action and thus regulate relationships between them—European colonial law on the one hand, and the customary law of the native peoples on the other—in present-day African societies the plurality of legal orders is much more extensive and the interactions between them much denser. Paradoxically, if this denser relationship makes conflict and tension between the different legal orders more likely, it also shows that the different legal orders are more open and susceptible to mutual influences. The boundaries between the different legal orders become more porous and each one loses its ‘pure’, ‘autonomous’ identity and can only be defined in relation to the legal constellation of which it is a part. Out of this porosity and interpenetration evolve what I call *legal hybrids* [emphasis added], that is, legal entities or phenomena that mix different and often contradictory legal orders or cultures, giving rise to new forms of legal meaning and action.¹²⁶

In his view, hybridization is “a new kind of legal pluralism” and it shows how the dichotomies between state law and customary law “are a good starting point, as long as it is clear from the outset that they will not provide the point of arrival.”¹²⁷ Santos also emphasized the importance of new supranational legal orders that add to the subnational legal plurality:

Until recently, the analysis of legal plurality was centered on the identification of local, intrastate legal orders, which coexisted in different forms alongside the official, national law. Today, alongside local and national legal orders, supranational legal orders are emerging, which interfere in multiple ways with the

¹²⁴ "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasagarda," *Law & Society Review* 12, no. 1 (1977).

¹²⁵ Boaventura de Sousa Santos, "The Heterogeneous State and Legal Pluralism in Mozambique," *Law & Society Review* 40 (2006).

¹²⁶ *Ibid.*, 46.

¹²⁷ *Ibid.*

former. Subnational legal plurality acts in combination with supranational legal plurality.¹²⁸

This aspect has been analyzed extensively in the literature on legal pluralism. In an effort of systematization of this wide-ranging scholarship, Davies identified three main streams of legal literature. The first one focuses on pluralism as a result of colonialism and it comprises the studies concerned with the interaction between customary and state norms conducted in colonial and post-colonial contexts.¹²⁹ The second one analyzes “ordinary legal pluralism”, which exists within every contemporary society – and it encompasses the studies that look outside of the uncomfortable colonial heritage to identify instead the physiological plurality of laws at the subnational level.¹³⁰ The third stream, acknowledging the influence of supranational legal orders, focuses in particular on “the interaction of local law with normative ordering emanating from processes of globalization.”¹³¹

Notwithstanding the added value of this systematization, which allows the reader to navigate more easily the vast literature on legal pluralism, the three main streams identified above are interdependent and by all means fluid. In particular, it is important to note that no contemporary study of legal pluralism in post-colonial contexts can be oblivious to the influence of supranational norms. These norms are extremely important in domains like human rights, environmental law and investment law – all legal domains that are relevant to the present research.

¹²⁸ *Ibid.*, 45.

¹²⁹ In this first stream, amongst the works cited above are for example those of Griffiths and Hooker.

¹³⁰ The work of Santos on the law of Pasagarda is a clear example of this: de Sousa Santos, “The Law of the Oppressed: The Construction and Reproduction of Legality in Pasagarda”.

¹³¹ Davies, “Legal Pluralism,” 815. Within this stream of literature, it is important to mention the contribution of Berman. See for example: “Global Legal Pluralism,” *Southern California Law Review* 80 (2007).

V. The Approach of This Research

Legal Pluralism as Theoretical Framework

As discussed above, a plurality-conscious approach is needed in the study of law – and particularly of African law. Moreover, when looking at land tenure regimes in Africa the acknowledgement of the existence of multiple normative orders is crucial. As many studies have documented, less than 25 percent of land in this region is held under state-delivered titles whilst about 80 per cent of land transactions are regulated by customary law.¹³²

As Chapter 2 will illustrate, the introduction of formal state-delivered titles to land in Africa has been considered by many as the necessary precondition to hasten economic development. Therefore, in light of the modernization objectives of postcolonial states, starting from the 1970s many countries have implemented policies aimed at reducing pluralism in land and formalizing land titles. However, the failure of these development policies has been thoroughly documented and discussed by the literature, so that legal pluralism remains central in the management of land in sub-Saharan Africa.¹³³ In this context, coexisting legal orders foresee different ways of allocating resources and respond to different imperatives and logics in ways that can give rise to conflicts. As Falk Moore notes, “property in land is surely one of the most socially embedded elements of a legal order”¹³⁴ and land tenure is one of the areas in which state norms face stronger resistance in their local application, as local practices regulating the use of land are particularly strong and deeply rooted in rural areas. These

¹³² Chirayath, Sage, and Woolcock, "Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems."; Tobin, *Indigenous Peoples, Customary Law and Human Rights: Why Living Law Matters*. Other authors offer slightly different figures. See for example: George Schoneveld, "The Anatomy of Large-Scale Farmland Acquisitions in Sub-Saharan Africa," in *CIFOR Working Papers* (Bogor: Center for International Forestry Research, 2011); Klaus Deininger and Derek Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?* (Washington, DC: World Bank, 2011).

¹³³ For a review of the literature on land tenure in Africa, see Section VII of Chapter 2.

¹³⁴ Moore, "Changing African Land Tenure: Reflections on the Incapacities of the State," 33.

plural norms should be read in their interaction. As Meizen-Dick and Pradhan wrote in relation to land tenure regimes,

different legal orders should not be seen as isolated from one another, but as interacting, influencing each other, and 'mutually constitutive'... How exactly these different legal orders interact and influence each other depends on power relationships between the 'bearers' of different laws.¹³⁵

The current wave of agricultural investments, which is the object of this research, takes place in a legal pluralist scenario, in which different layers of norm provide different tools to the actors involved i.e., state and customary authorities, local communities, and investors. As noted in the literature, a legal pluralist approach can shed light on the power dynamics between actors, by highlighting which normative frameworks are used to regulate transactions.¹³⁶

This study aims to understand and compare the contemporary unfolding of large-scale agricultural investments in two selected countries, Ghana and Zambia, by analyzing the process through which investors access land and highlighting the plural set of norms at play. In particular, the research addresses the following questions: How did plural land tenure regimes change over time? How do investors access land and what norms regulate large-scale land investment at the local level? How do customary and state law contribute to shaping local outcomes and which actors use them as tools in their transactions?

The theoretical approach has been driven by the underlying research questions. The acknowledgement of custom as an autonomous source of law and the study of its interaction with state norms assume that the positivistic paradigm of legal reasoning centered on state authority is not sufficient. As such, this research looks at large-scale

¹³⁵ Meizen-Dick and Pradhan, "Legal Pluralism and Dynamic Property Rights", 7.

¹³⁶ In this sense, see: Pierre Merlet and Johan Bastiaensen, "Struggles over Property Rights in the Context of Large-Scale Transnational Land Acquisitions. Using Legal Pluralism to Re-Politicize the Debate," in *Institute of Development Policy and Management Discussion Paper* (Antwerp: University of Antwerp, 2012).

land investments through the lenses of dynamic legal pluralism to illustrate the interconnections between normative orders. As a theoretical starting point, this research adopts Griffiths' "strong legal pluralism" perspective and as such it considers that normative orders interact in their own right, and not as regulated and disciplined by the State.

This approach, closely related with Sacco's work on legal formants, entails the acknowledgement of different sources of law, which derive from different types of authorities and operate in the same social space. In the study of state and customary law and their regulation of land investments, this research takes into account the fact that these bodies of law are not insulated. In order to identify the "boundaries" of legal pluralism and to have a definition of "customary law," the pragmatic approach suggested by Tamanaha is used, i.e., the realm of law covered by this research is the one recognized as such by the concerned actors.¹³⁷ Such an approach requires ethnographic research in order to understand the application of rules as experienced by the actors involved and to identify the boundaries of local law. As noted by Reimann,

an anthropological approach to comparative law becomes outright essential when the discipline turns to legal systems with strong indigenous elements, because there the cultural aspects of law quickly become more important than the technical ones.¹³⁸

Consequently, as the rest of this Section will illustrate, a methodology informed by anthropological methods was used to collect information and data on large-scale land investments, in light of the theoretical framework adopted.¹³⁹

¹³⁷ Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global".

¹³⁸ Mathias Reimann, "Comparative Law and Neighbouring Disciplines," in *The Cambridge Companion to Comparative Law*, ed. Mauro Bussani and Ugo Mattei (Cambridge: Cambridge University Press, 2012), 30.

¹³⁹ See the discussion of "question-driven methodological choices" in: Maurice Adams and Jacco Bomhoff, eds., *Practice and Theory in Comparative Law* (Cambridge: Cambridge University Press, 2012), 6.

In light of the critical analysis offered by Chanock and others illustrated above, the importance of colonialism in shaping the realm of customary law is acknowledged in this work. Without denying the binding force nor the legitimacy of customary law, this research takes into account the power asymmetries at play within its realm and, as suggested by Ubink, it “engages” with customary law with “open eyes.”¹⁴⁰ This approach acknowledges that customary law is a dynamic and negotiated process, which may leave room for opportunistic and rent seeking behaviors. As such, customary law is not in itself inherently just, but like statutory law it is the product of struggles for power that inevitably bring about winners and losers.

Country Selection

The first phase of the research aimed to identify the countries for the study. A total of two countries was deemed suitable – on the one hand to identify similarities and differences and on the other to avoid “parallel country studies”¹⁴¹ due to an excessively large pool of systems analyzed. Moreover, time limitations relating to data collection in the field required narrowing the scope of the research, whilst still providing sufficient material for drawing effective comparisons. To select the two countries as objects of this study, two main criteria were used: the presence of large-scale agricultural investments and pluralism in land management.

A preliminary review of the literature on large-scale acquisition was conducted, with a scope narrowed to countries in sub-Saharan Africa – a region that has recently experienced a significant increase in the acquisitions of land. In light of the methodology chosen for the research, countries with ongoing political unrest have not

¹⁴⁰ Janine M. Ubink, "Negotiated or Negated? The Rhetoric and Reality of Customary Tenure in an Ashanti Village in Ghana," *Africa: Journal of the International African Institute* 78, no. 2 (2008).

¹⁴¹ Mathias Siems, *Comparative Law* (Cambridge: Cambridge University Press, 2014), 15.

been considered, due to the related stalemate in the implementation of land investments and to the impossibility of conducting field research. As such, data on land acquisitions in Mali, Sudan, South Sudan, and Central African Republic were not reviewed. Moreover, in light of the health situation during the period earmarked for field research, the countries affected by the 2014 Ebola outbreak were also excluded, i.e. Liberia, Sierra Leone, and Guinea.

Given that the phenomenon of large-scale land acquisitions is still a recent one and that in many cases the underlying contracts are not publicly available, there is no agreement in the literature on the exact size of the land investments and their location. In 2013, the *Journal of Peasant Studies*, a publication that hosted an academic debate on land investments, devoted a special issue to a critical discussion of the methods employed in this research.¹⁴² As contended in the editorial introduction, more research is needed to provide reliable data on land investments:

in the current, burgeoning debate on large-scale land deals, numbers matter. There are big economic and political stakes at play, and astonishing figures of ‘millions of hectares’ play well in media and policy debates at different levels. But how do we collect reliable data on where land deals are taking place, their size, status and state of production? How do we assess where investments might be most appropriate, offering the greatest returns, given poor existing or baseline information on land use, availability and suitability? How do we understand land deals in the context of wider agrarian transitions, shifting labour regimes and reconfigurations of rural economies? What methods are most appropriate? Can crowd-sourcing approaches be effective? How are claims validated and crosschecked? What are the wider political implications of such data, especially as they become appropriated by different actors?¹⁴³

Moreover, difficulties in tracing the implementation of the acquisitions increase the complexity of data collection. The World Bank reported that

country level data collection [i]s complicated by the generally limited amount of information collected from investors preapproval and especially post approval of the investment, the lack of data coordination between different agencies and levels of government, and in some cases the complete absence or questionable

¹⁴² “JPS Forum on Global Land Grabbing Part 2: on Methods” 40, no.3.

¹⁴³ Ian Scoones et al., “The Politics of Evidence: Methodologies for Understanding the Global Land Rush,” *Journal of Peasant Studies*, 40, no. 3 (2013): 429.

provenance of important details, such as the investment's location and implementation status.¹⁴⁴

NGOs and research institutes have elaborated alternative data sets on the size of the investments, whose figures range from 56 to more than 200 thousand hectares.¹⁴⁵ The divergence in data has been analyzed in the literature; Edelman pointed out that

an accelerated process of dispossession is clearly in motion, but countering it effectively requires precise and accurate information, which is difficult to obtain. In the absence of accurate information, oversimplified, outlandish or sensational claims may not only undermine efforts to counter specific cases of land grabbing – and claims about land grabbing more generally – but may also divert attention from less publicized cases and from the actors behind the hectares.¹⁴⁶

Given the limitations described above, amongst the datasets available the Land Matrix project deserves special attention, as it constitutes an experimental participative platform where data on land investments are collected thorough a crowd-sourcing system that utilizes the constant input of researchers and users.¹⁴⁷ However, as highlighted by the field research conducted, this database did not include some of the investments analyzed and as such it likely provided an underestimated picture of the phenomenon.

An interesting dataset has been provided by Schoneveld, who combined empirical research and desk review to collected data on large-scale land acquisitions in sub-Saharan Africa.¹⁴⁸ Schoneveld included in his report acquisitions that “involve the transfer of use or ownership rights over contiguous areas of land larger than 2000 ha”¹⁴⁹ and whose land transfer agreements were concluded from 2005 onwards. The author

¹⁴⁴ Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*, 145.

¹⁴⁵ See Section IV of Chapter 2.

¹⁴⁶ Marc Edelman, "Messy Hectares: Questions About the Epistemology of Land Grabbing Data," *Journal of Peasant Studies* 40, no. 3 (2013): 488.

¹⁴⁷ The Land Matrix is a global observatory created by NGOs and research institutes: its partners are the International Land Coalition, the *Centre de Coopération Internationale en Recherche Agronomique pour le Développement*, the Centre for Development and Environment, the GIGA German Institute of Global and Area Studies / *Leibniz-Institut für Globale und Regionale Studien* and the *Deutsche Gesellschaft für Internationale Zusammenarbeit*. The website is available at: www.landmatrix.org.

¹⁴⁸ Schoneveld, "The Anatomy of Large-Scale Farmland Acquisitions in Sub-Saharan Africa".

¹⁴⁹ *Ibid.*, 4.

focused exclusively on investments for plantation and forestry and showed that the majority of acquisitions took place in seven countries (Ethiopia, Ghana, Liberia, Mozambique, South Sudan and Zambia) for which the area acquired constitutes 65.7 percent of the total.¹⁵⁰

In light of the clear definition of large-scale land acquisitions adopted by Schoneveld, and the fact that his dataset exclusively focuses on agricultural investments – which are the object of this research - the country selection relied heavily on his report. Among the seven countries identified by Schoneveld, Zambia and Ghana are respectively the second and third top recipients of land investments.

In order to compare the unfolding of land investments in the two countries and to analyze the role of legal pluralism in the process, countries with similar systems of land management were selected. Both Ghana and Zambia were subject to British rule which introduced a colonial layer of norms, part of which shapes the contemporary land system. In the two countries, the role of customary tenure is central and the legal framework regulating land tenure foresees the role of chiefs.¹⁵¹

Method

Once the two countries for the case study were identified, a preliminary desk review of the literature on land tenure and large-scale land investments in Ghana and Zambia was conducted, followed by field research of five months conducted between October 2014 and March 2015. The first part of the field research was based in Ghana (October-December), and the second one in Zambia (January-March). In each country, approximately 35 interviews and 3 focus group discussions were conducted with key

¹⁵⁰ *Ibid.*, 12.

¹⁵¹ For a cross-country analysis of land tenure in Africa and a critical discussion of legal pluralism, see: Liz Alden Wily, "'The Law Is to Blame': The Vulnerable Status of Common Property Rights in Sub-Saharan Africa," *Development and Change* 42, no. 3 (2011).

informants and concerned groups identified in the field. These included government officials, civil society organizations officers, foreign investors, smallholder farmers, customary authorities and members of the local communities. Participation in the interviews and focus group discussions was voluntary and not remunerated;¹⁵² the participants consented to the use of the interview material in anonymous form.

The first round of interviews was conducted in the capital cities, Accra and Lusaka, and they contributed to the identification of investment cases to be analyzed in depth. Officials from the Investment Promotion Agencies and other relevant Ministries, such as Agriculture and Land provided guidance on the areas where large-scale investments were being implemented. The data was crosschecked in consultation with civil society organizations active in the field of land rights, which provided for constructive feedback on the selected investments to be included in the study. For this purpose, only investments involving more than 500 hectares and for which land had already been acquired were considered.

After the preliminary round of interviews in the capital cities, for three of the most relevant investments identified in the country, a field trip was conducted and several interviews took place *in loco* with key informants. Moreover, in each of these rural districts a focus group discussion was facilitated with smallholder farmers affected by the investments. For these discussions, the support of a translator from the local languages to English was sought.

The interviews conducted were semi-structured and revolved around the main questions of this research. The informants were asked to describe their role in

¹⁵² None of the interviewees was remunerated for their collaboration in the research. In order to gain access to village chiefs and to interview them, a gift was generally required to show respect for their authority. None of the chiefs accepted to be interviewed without these. In Ghana, the gift consisted of a bottle of liquor, whereas in Zambia a set of groceries including sugar, rice and soap was required. Given the crucial importance of interviewing village chiefs for this research, such gifts were always presented in order to conduct the interviews.

facilitating the investments and to discuss the key actors and the process of land acquisition at the local level. The questions aimed to understand what rules regulate the investments at the local level and at the same time how investors navigate the plural legal environment. Moreover, they aimed to identify the understanding of rules by the community and by the other actors involved, in light of the approach adopted in the research.

After the field research, the data obtained was elaborated on and more desk research was also conducted. Due to time and resource limitations, no follow-up field research was possible. As such, the data collected portray only a specific point in time for the investments studied and their implementation. However, this research did not aim to cover the life cycle of land investments, but rather to identify the processes that regulate the unfolding of these investments, both from a statutory as well as a customary perspective.

The following Chapter will Chapter will review the literature on large-scale land acquisitions and provide an overview of the multi-disciplinary contributions to the global debate.

Chapter 2:

The Debate on the Global Land Rush

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I. Introduction

Over the past decade, widespread consensus has emerged on the crucial role played by land in developing economies. Land is the only factor of production of which a physically limited supply exists and in the Western world it is at the hearth of economic relations. The finite nature of land has become more and more evident in developed economies where environmental degradation and global warming challenge the capacity of markets to produce food supplies for internal consumption and international exports. In this context, the sharp increase in the prices of food from 2006 on—years in which the global food price index increased by 37.7 percent¹—has facilitated the consensus over the need for new *fora* of food production. Moreover, the world population is in continuous expansion; the Food and Agriculture Organization (FAO) estimated that food production would need to increase by 50 percent by 2050 in order to sufficiently feed the globe.² In light of this, agricultural investment seems the only way to improve

¹ Food and Agriculture Organization, "Fao Price Index Data," ed. Food and Agriculture Organization (2010). The data refers to the period between 2006 and 2010.

² Food and Agriculture Organization, *The Future of Food and Agriculture: Trends and Challenges* (Rome: Food and Agriculture Organization, 2017), 46. Although the majority of studies point to the need for an increased food production (see, for example, Lester Brown, "The New Geopolitics of Food," *Foreign Affairs* 84 (2011); David Hallam, "Foreign Investment in Developing Country Agriculture: Issues, Policy Implications and International Response" (paper presented at the VIII Global Forum on International Investment, Paris, 2009)), some authors have argued that a better

agricultural productivity and ensure that our growing planet can be fed. In addition, data indicates that the Western world has reached its maximum capacity in terms of agricultural expansion. As pointed out by FAO, by 2050 arable land in use in the Western world may decline by 50 million hectares, i.e., by eight percent – this decline being offset by a forecasted increase by 120 million hectares in developing countries.³

Against this background, land located in developing economies has attracted unprecedented interest from investors, including transnational corporations and foreign governments. Statistics and data produced through sophisticated satellite imagery show that the Global South has a “yield gap” that can be bridged through agricultural investment.⁴ This data points to a strong potential for agricultural production to be achieved through the expansion of cultivated land in developing countries, where vast portions of land appear under-utilized.⁵ According to the World Bank, the potential to expand agricultural production is particularly significant in sub-Saharan Africa, where decades of under-investment in agriculture determine rates of productivity amongst the lowest in the world.⁶ In the same study, the World Bank noted that in sub-Saharan Africa under-utilized and “marginal” land amounts to a substantial percentage of the

system of food distribution and delivery would satisfy the food needs of the world population (A. Haroon Akram-Lodhi, "Contextualizing Land Grabbing: Contemporary Land Deals, the Global Subsistence Crisis and the World Food System," *Canadian Journal of Development Studies* 33 no. 2 (2012); Amartya Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford: Clarendon Press, 1981). This issue will be discussed in Section V.

³ Food and Agriculture Organization, *Global Agriculture Towards 2050* (Rome: Food and Agriculture Organization, 2015).

⁴ Klaus Deininger and Derek Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?* (Washington, DC: World Bank, 2011); Göran Djurfeldt, "Land Speculation and the Rights of the Poor: The Case of Sub-Saharan Africa," in *Foreign Land Investment in Developing Countries: Contribution or Threat to Sustainable Development?*, ed. Food and Agriculture Organization (Stockholm: Ministry for Rural Affairs and Swedish FAO Committee, 2010).

⁵ Joachim Von Braun and Ruth Meizen-Dick, "“Land Grabbing” by Foreign Investors in Developing Countries: Risks and Opportunities," in *IFPRI Policy Brief* (Washington DC: International Food Policy Research Institute, 2009).

⁶ Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*.

total land available.⁷ Moreover, in these countries, land transactions are processed at prices that are significantly lower than in developed economies.⁸

It is therefore not surprising that, starting in the late 2000s, the pace of foreign land acquisitions in developing countries has increased significantly and “the demand for land has been enormous.”⁹ These investments have often taken the form of land acquisitions aimed at producing agricultural commodities and biofuels for export markets. Large portions of land, whose size is generally disproportionate with the average land holding size in the area (with many acquisitions covering more than 10 thousand hectares),¹⁰ have been acquired by foreign investors in the global South. In the absence of reliable sets of data, many studies have been conducted to quantify the land transfers and to understand which countries have been especially targeted by investors.¹¹ However, there still is no agreement on the data so that several figures—sometimes contradictory—exist.¹² In a 2011 report that aimed at analyzing and understanding this

⁷ *Ibid.* The idea that land is “an almost inexhaustible asset in Africa” (Camilla Toulmin, “Securing Land and Property Rights in Sub-Saharan Africa: The Role of Local Institutions,” *Land Use Policy* 26, no. 1 (2009): 11) is not shared by many scholars who look at land tenure issues in sub-Saharan Africa. Toulmin, for example, points to the increasing conflicts over land and highlights the “mounting competition for land resources” (*ibid.*). Similarly, the anthropology literature on land tenure in Africa discusses the increased competition over land in Africa and questions the assumptions concerning the potential for agricultural expansion in the continent (see, for example: Sara Berry, “Property, Authority and Citizenship: Land Claims, Politics and the Dynamics of Social Division in West Africa,” *Development and Change* 40, no. 1 (2009); Pauline E. Peters, “Land Appropriation, Surplus People and a Battle over Visions of Agrarian Futures in Africa,” *Journal of Peasant Studies* 40, no. 3 (2013). This issue will be discussed further in Section VII.

⁸ Lorenzo Cotula, “Land Deals in Africa: What Is in the Contracts?,” (London: International Institute for Environment and Development 2011).

⁹ Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*, XIV.

¹⁰ Hallam, “Foreign Investment in Developing Country Agriculture: Issues, Policy Implications and International Response,” 3.

¹¹ See, for example: Ward Anseeuw et al., “Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project,” (Rome: International Land Coalition, 2012); Lorenzo Cotula et al., “Testing Claims About Large Land Deals in Africa: Findings from a Multi-Country Study,” *The Journal of Development Studies* 50, no. 7 (2014); George Schoneveld, “The Anatomy of Large-Scale Farmland Acquisitions in Sub-Saharan Africa,” in *CIFOR Working Papers* (Bogor: Center for International Forestry Research, 2011).

¹² In addition to the references in the previous footnote, see the Land Matrix Database available at: www.landmatrix.org.

phenomenon, the World Bank emphasized the significance of the increased interest in farmland and noted that

compared to an average annual expansion of global agricultural land of less than 4 million hectares before 2008, approximately 56 million hectares worth of large-scale farmland deals were announced even before the end of 2009.¹³

From the early days of this investment trend, the media has drawn attention to it and has highlighted the threats these acquisitions could pose. In particular, the episode involving South Korean Daewoo Logistics in Madagascar marked the beginning of a lively international debate that is still ongoing and currently oscillates between the notions of “land grab” and “land investment.” In 2009 the company announced an agreement with the Malagasy government for a 99-years lease of more than 3 million hectares—i.e., more than half the country’s arable land¹⁴—which exacerbated political unrest. After months of protests and public outcry, the Malagasy President was forced to resign and his successor cancelled the contract with the South Korean firm.¹⁵ Similarly, since 2008 the Ethiopian government has been in the spotlight for its decision to allocate more than 300 thousand hectares of land to the Indian investor Karuturi Global,¹⁶ for the development of an extensive export-oriented floriculture. Many commentators emphasized the paradox of such a land use: Ethiopia is one of the world’s most food aid dependent countries, so that the decision to promote export-oriented agricultural investments has been read by some commentators as an obstacle to the strengthening of

¹³ Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*, XIV.

¹⁴ Akram-Lodhi, "Contextualizing Land Grabbing: Contemporary Land Deals, the Global Subsistence Crisis and the World Food System."

¹⁵ For an account of this episode, see the articles on the *Financial Times*: Javier Blas, "Land Leased to Secure Crops for South Korea," *Financial Times*, November 18, 2008; Tom Burgis and Javier Blas, "Madagascar Scraps Daewoo Farm Deal," *Financial Times*, March 18, 2009; Javier Blas, "S Koreans to Lease Farmland in Madagascar," *Financial Times*, November 19, 2008.

¹⁶ See for example: Raghuvir Badrinath, "Karuturi Global Promoters Increase Pledge as Problems Continue," *Business Standard*, August 14, 2013; Aman Sethi, "Karuturi Debacle Prompts Ethiopia to Review Land Policy," *The Hindu*, June 1, 2013.

domestic food security.¹⁷ Following these controversial transactions, the debate on land acquisitions has been in the spotlight, both in media and research reports.

This Chapter aims at capturing the complexity of the abovementioned debate by providing an overview of the key features that dominated it, with particular reference to the sub-Saharan region. First, it frames the international debate on land acquisitions and reviews the numerous attempts to define them. It then reviews the phases of literature on land investment by focusing on the scope and the approach methods used. After that, it discusses the causes and drivers as identified in the literature. It continues with a discussion on the potential benefits that land acquisitions could bring to the host countries as well as the associated threats, which have been widely discussed by activists and scholars. In relation to the threats posed by land acquisitions, the Chapter also briefly discusses the international political response to the increase in land investment by focusing on the soft-law instruments issued by the World Bank and FAO - two organizations that have deeply influenced the debate on land investments. Before concluding, it provides background on the broader discussion concerning land tenure in sub-Saharan Africa by reviewing the sociological and anthropological literature on land tenure and land reform. This debate is strongly connected to the one on land acquisitions as their impact on local population can only be understood in light of the anthropological dimension of land in sub-Saharan Africa. This research aims to connect this literature to the broader debate on land investments, and vice-versa, as the next two chapters devoted to the field research in Ghana and Zambia will practically illustrate.

¹⁷ On food security and land acquisitions in Ethiopia, see for example: Bamlaku Alamirew, "Do Land Transfers to International Investors Contribute to Employment Generation and Local Food Security? Evidence from Oromia Region, Ethiopia," *International Journal of Social Economics* 42, no. 12 (2015); Dessalegn Rahmato, "The Perils of Development from Above: Land Deals in Ethiopia," *African Identities* 12, no. 1 (2014).

II. Framing the International Debate: Land Investments or Land Grabs?

After the Daewoo episode in Madagascar increased attention has been placed on foreign land acquisitions, both by media and civil society organizations. A 2008 report from a Spanish non-governmental organization, GRAIN, was the first publication to critically discuss the increased interest in farmland by dubbing it “land grab” and connecting it to the issue of food security and rural poverty.¹⁸ The report aimed at fostering the international debate on land in developing countries and it provided very strong arguments against foreign land investments whilst at the same time calling for action against them. It argued that “foreign private corporations [were] getting new forms of control over farmland to produce food not for the local communities but for someone else”¹⁹ and it questioned the long term impact of those investments by asking “what happens over the long term when you grant control over your country’s farmland to foreign nations and investors?”²⁰ The report identified two main drivers for land investments and “land grabs,” namely: the food security concerns of food-import dependent countries and the financial returns threatened by the financial crisis. As the report highlighted, “food and financial crises combined... turned agricultural land into a new strategic asset”²¹ and thus stimulated the demand for land in developing countries. This wave of investment, according to the organization, threatened food security in developing countries by reducing access to land for local food production and promoting an export oriented agriculture that does not serve the local food markets.

As an appendix, the report included a detailed list of more than a hundred “land grabs” that implied the acquisition of large tracks of land in developing countries and it called on readers to add and contribute to this list with additional information on land

¹⁸ GRAIN, “Seized! The 2008 Land Grab for Food and Financial Security,” (Barcelona: GRAIN, 2008).

¹⁹ *Ibid.*, 3.

²⁰ *Ibid.*, 10.

²¹ *Ibid.*, 2.

acquisitions worldwide. This way, GRAIN developed the first set of data on foreign land acquisitions on which much of the literature relied in the subsequent years.²² Moreover, in the absence of official data and cross-country research, the policy debate was also influenced by these preliminary figures and information. As such, this early report by GRAIN was extremely influential in framing the terms of the discussion around “land grabs” and food security as well as in identifying the geographical area affected by the phenomenon. In the list of investments annexed to the report, more than 35 percent of the projects were in sub-Saharan Africa – the continent very quickly became the focus of attention for media and subsequently also researchers.

After the publication of the GRAIN report, the debate on farmland acquisitions gained momentum thanks to the contribution of development practitioners and policy institutes like the International Food Policy Research Institute²³ and the International Institute for Environment and Development,²⁴ of international organizations like the World Bank and the Food and Agriculture Organization,²⁵ and of non-governmental organizations like Oxfam.²⁶ All these organizations, together with other civil society actors, published numerous reports and studies following the rapid evolution of the data provided by the media. As such, in the first years after the GRAIN report and the Madagascar controversial land deal the debate focused on the scale of the investments, which appeared disproportionate with respect to the previous investment trends.

²² A discussion of the method and the sources used by this database and the others available has been carried out in Chapter 1.

²³ Von Braun and Meizen-Dick, ““Land Grabbing” by Foreign Investors in Developing Countries: Risks and Opportunities.”

²⁴ Cotula, “Land Deals in Africa: What Is in the Contracts?”.

²⁵ Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*; Food and Agriculture Organization, ed. *Foreign Land Investment in Developing Countries: Contribution or Threat to Sustainable Development?* (Stockholm: Ministry for Rural Affairs and Swedish FAO Committee, 2010).

²⁶ Oxfam, “Land and Power: The Growing Scandal Surrounding the New Wave of Investments in Land,” in *Oxfam Briefing Paper* (Oxfam, 2011).

At these early stages, the debate on land acquisitions was framed as an opposition between “land grabs” and “land investments.” These competing definitions imply a different understanding of the challenges and opportunities of large-scale land acquisitions and of the way forward in terms of policy making. In particular, the advocates of land investments have focused on the potential for poverty reduction and economic growth whereas critics have stressed the disruptive potential of such investment by emphasizing the negative impact on livelihood of local communities who are seen as “bearing the cost”²⁷ of these investments.

When academic researchers started contributing to this debate, especially within the field of development studies, they stimulated a more analytical discussion that set the current wave of investment into historical perspective and connected it with broader land tenure and agrarian reform issues in developing countries. Thanks to the input of academia, the phenomenon became the object of numerous country-specific case studies aimed at understanding the actual scale and the impact of land acquisitions. Moreover, increased attention was paid to the political economy of land and to the ongoing processes of commodification of land globally.²⁸ Notwithstanding the significant input of academia, there still is no agreement in the literature (including in the studies produced by development practitioners) as to the definition of the ongoing wave of investment to which some scholars refer as “land grabs” or “land deals,” others as “land investments” or “large-scale land acquisitions.” These diverging definitions reflect the analytical differences in the literature and will be illustrated in the following Section.

²⁷ Anseeuw et al., “Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project,” 21.

²⁸ Paoloni Lorenza, “La “sottrazione” delle terre coltivabili e il fenomeno del Land Grabbing,” *Rivista di Diritto Agrario* 2 (2012).

III. Towards a Definition of Large-scale Land Acquisitions

As mentioned above, the wave of land acquisitions in developing countries has swiftly been scrutinized by development practitioners and dubbed as “land grab” or “land grabbing.” This term was first introduced by Karl Marx in *Das Kapital*, where he discussed British enclosures from the 15th to the 19th century: “land grabbing on a great scale, such as was perpetrated in England, is the first step in creating a field for the establishment of agriculture on a great scale.”²⁹

This expression, however, appears counter-intuitive: as Li pointed out “land cannot in fact be grabbed, because it stays where it is.”³⁰ Notwithstanding this logical flaw, the expression “land grab” has been purposely used both by activists and researchers and it has entered the mainstream of development studies by highlighting some key characteristics of the ongoing wave of land acquisitions. First of all, it puts emphasis on the dispossession that these acquisitions generate. As in the context of British enclosures, some authors argue that land acquisitions are creating a reserve army of rural dwellers by expelling farmers from their land and thus significantly altering the fundamental elements of agrarian societies.³¹ Therefore, the literature that refers to “land grabs” emphasizes the threats to rural livelihood that these investments pose. Second, the expression “land grab” underlines the forcible nature of these transaction by pointing to an asymmetry of power and resources between the parties involved. A “land grab” implies that one of the parties is vulnerable and is not afforded protection from the transaction, which is imposed on him.³² Moreover, this expression emphasizes the

²⁹ Karl Marx, *Capital*, vol. 1 (London: Lawrence and Wishart, 1977 [1867]), 470.

³⁰ Tania Murray Li, “Transnational Farmland Investment: A Risky Business,” *Journal of Agrarian Change* 15, no. 4 (2015): 562.

³¹ *Ibid.*; Peters, “Land Appropriation, Surplus People and a Battle over Visions of Agrarian Futures in Africa.”

³² Olivier De Schutter, “How Not to Think About Land-Grabbing: Three Critiques of Large-Scale Investments in Farming,” *Journal of Peasant Studies* 38, no. 2 (2011).

illegality of the investments.³³ As such, most of the literature that refers to “land grabs” analyzes the involvement of local communities in the decision making process over land deals and finds that often no consent is sought prior to the acquisition of land.³⁴ Third, the reference to Marx’s expression “land grabbing” points to the transformations of agriculture towards large-scale production. Consequently, most of the literature that refers to “land grab” points to the ongoing changes in agricultural production and emphasizes in particular the weaknesses and vulnerabilities of large-scale agriculture and plantation models.³⁵

Notwithstanding the fact that “land grab” has quickly become a key word both in literature as well as policy circles, the expression still lacks a clear-cut definition. Zoomers attempted to clarify the scope of this expression and wrote that

the term ‘land grab’ generally refers to large-scale, cross-border land deals or transactions that are carried out by transnational corporations or initiated by foreign governments. They concern the lease (often for 30–99 years), concession or outright purchase of large areas of land in other countries for various purposes.³⁶

Unfortunately this definition does not shed light on many of the central elements of land deals. In particular, the “large-scale” characteristic is not quantified – no clear parameters are set as to what precisely constitutes large-scale, and what does not, when referring to the areas transferred to investors. Moreover, the purposes of the acquisitions are not specified, so that land acquisitions for infrastructural or industrial development are grouped with those pertaining to agricultural development. In her work, Zoomers chose to emphasize the “foreignization”³⁷ component, by stressing the role of foreign actors in the rush for land. A similar and equally broad definition of “land grab” was

³³ Via Campesina, "Conference Declaration: Stop Land Grabbing Now!," news release, 2011.

³⁴ These elements will be discussed more in detail in Section VI.

³⁵ Ben White et al., "The New Enclosures: Critical Perspectives on Corporate Land Deals," *Journal of Peasant Studies* 39, no. 3-4 (2012).

³⁶ Annelise Zoomers, "Globalisation and the Foreignisation of Space: Seven Processes Driving the Current Global Land Grab," *Journal of Peasants Studies* 37, no. 2 (2010): 429.

³⁷ *Ibid.*

given by the former UN Special Rapporteur on the Right to Food, Olivier de Schutter, who wrote of the “buying or leasing of large tracts of farmland, particularly in Sub-Saharan Africa, by governments or private investors.”³⁸

Other authors have provided more detailed and narrow definitions: Akram-Lodhi referred to the

buying, leasing or otherwise accessing productively used or potentially arable farmland by corporate investors to produce food and non-food crops in order either to boost supply for domestic and/or world markets or obtain a favourable financial return on an investment³⁹

and defined as “large-scale” all the investments of more than 200 hectares. Differently from Zoomers, he clearly referred to the size of such investments and to the acquisition of farmland; moreover, he excluded from the definition the acquisition of land for mining and for infrastructure, industrial and tourism development by focusing exclusively on the production of crops. By attempting to define the scale of these investments and adapting it to diverse local contexts, the NGO FIAN provided a different definition of land grabs that includes

taking possession of and/or controlling a scale of land for commercial/industrial agricultural production which is disproportionate in size in comparison to the average land holding in the region.⁴⁰

Other authors have emphasized another dimension of land grabs, which was not captured by the definitions above. As Carroccio and others noted, “land grabbing... describes large-scale and long-term farmland acquisition below the real market values.”⁴¹ By referring to the market values of land, the authors implied that the acquisition of land in the global South happens at lower prices and thus at the expenses

³⁸ Olivier De Schutter, "The Green Rush: The Global Race for Farmland and the Rights of the Land Users," *Harvard International Law Journal* 52, no. 2 (2011): 504.

³⁹ Akram-Lodhi, "Contextualizing Land Grabbing: Contemporary Land Deals, the Global Subsistence Crisis and the World Food System," 125.

⁴⁰ Food First Information and Action Network (FIAN), "Land Grabbing in Kenya and Mozambique: A Report on Two Research Missions and a Human Rights Analysis of Land Grabbing in Kenya and Mozambique," (Heidelberg: FIAN, 2010).

⁴¹ Anna Carroccio et al., "The Land Grabbing in the International Scenario: The Role of the EU in Land Grabbing," *Agricultural and Food Economics* 4, no. 12 (2016): 1.

of local communities, who lose out in the transactions in favour of investors. However, as Section VI will discuss, this reference to the market may be misleading as it implies the existence of a land market in the first place. This, as some authors have pointed out, is not the case in developing countries and especially in sub-Saharan Africa, where land tenure is the outcome of a complex web of social and legal relations encompassing multiple actors.⁴²

An influential definition of “land grab” has been given by Via Campesina, a farmers’ organization active in the debate on land use and development. In the Tirana declaration, a political manifesto redacted after an international convention held in Albania, land grabs were defined as

acquisitions or concessions that are one or more of the following: (I) in violation of human rights, particularly the rights of women; (II) not based on free, prior and informed consent of the affected land-users; (III) not based on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are gendered; (IV) not based on transparent contract that specify clear and binding commitments about activities, employment and benefits sharing, and; (V) not based on effective democratic planning, independent oversight and meaningful participation.⁴³

In this definition, the illegality of the transactions is emphasized and the violation of human rights becomes central. Moreover, the gender impact of land acquisitions is made part of the definition: many studies have showed that women are amongst the most affected by these transactions.⁴⁴ Such a definition has been extremely important in the advocacy against land acquisitions made by numerous civil society organizations over the past few years, but it offers little clarity to researchers interested in the

⁴² Lorenzo Cotula, "The New Enclosures? Polanyi, International Investment Law and the Global Land Rush," *Third World Quarterly* 34, no. 9 (2013); Murray Li, "Transnational Farmland Investment: A Risky Business." For a critique of the idea of a market for land in developing countries, see also: A. Haroon Akram-Lodhi, "Land, Markets and Neoliberal Enclosure: An Agrarian Political Economy Perspective," *Third World Quarterly* 28, no. 8 (2007). On land tenure in sub-Saharan Africa, see Section VII.

⁴³ Campesina, "Conference Declaration: Stop Land Grabbing Now!".

⁴⁴ See for example: Behrman Julia, Ruth Meinzen-Dick, and Agnes Quisumbing, "The Gender Implications of Large-Scale Land Deals," *The Journal of Peasant Studies* 39, no. 1 (2012); Chu Jessica, "Gender and 'Land Grabbing' in Sub-Saharan Africa: Women's Land Rights and Customary Land Tenure," *Development* 54, no. 1 (2011). A gender analysis of the impact of large-scale land investments is beyond the scope of this work.

phenomenon. The definition is formulated by looking in depth at the decision-making processes and the consequences of land acquisitions, instead of their intrinsic characteristics. Moreover, although the term “land grab” is widely used in the academic literature, especially in the realm of development studies, many authors have criticized it for its vagueness and lack of analytical clarity. According to Hall,

the popular term ‘land grabbing’, while effective as activist terminology, obscures vast differences in the legality, structure and outcomes of commercial land deals and deflects attention from the roles of domestic elites and governments as partners, intermediaries and beneficiaries.⁴⁵

The author argued that “land grab” includes a too wide range of phenomena and called for a better analytical understanding of land use changes within the context of the increased interest in farmland in developing countries.⁴⁶ In line with this perspective, Borras and Franco refer to “land grab” as a “catch all framework”⁴⁷ that refers to very different phenomena happening across the world. With a similar rationale, other authors have chosen to refer to “large-scale land acquisitions” or “land deals” and not to “land grabs.” The analytical studies conducted by Cotula and Schoneveld, leading scholars in this field, referred to “land rush,” “land deals” and “large-scale land acquisitions” almost interchangeably.⁴⁸ In their research, these authors adopted working definitions of the phenomenon that allowed them to conduct empirical research and present data consistently. In addition, Cotula clarified that “land deal” and “agricultural investment,” although often used together in the literature,

⁴⁵ Ruth Hall, "Land Grabbing in Southern Africa: The Many Faces of the Investor Rush," *Review of African Political Economy* 38, no. 128 (2011): 193.

⁴⁶ A similar argument is made by Borras and Franco ("Global Land Grabbing and Trajectories of Agrarian Change: A Preliminary Analysis," *Journal of Agrarian Change* 12, no. 1 (2012)) on whose work Hall builds.

⁴⁷ Saturnino Jr. Borras and Jennifer Franco, "From Threat to Opportunity? Problems with the Idea of a 'Code of Conduct' for Land-Grabbing," *Yale Human Rights and Development Law Journal* 13, no. 2 (2010): 2.

⁴⁸ See, amongst the vast production of these two authors: Lorenzo Cotula, *The Great African Land Grab?: Agricultural Investments and the Global Food System* (London: Zed Books, 2013); George Schoneveld, "The Geographic and Sectoral Patterns of Large-Scale Farmland Investments in Sub-Saharan Africa," *Food Policy* (2014).

are different – not all land deals are investment in a societal sense, and not all investments in agriculture involve land deals.... In societal terms, investment requires something more – for example, contributions of capital, infrastructure or know-how for agricultural production... Also, large land deals are not the only possible avenue for commercial investment in agriculture. Investments can take many different forms and shapes.⁴⁹

A similar point was made by Anseuw and others, who noted that “many land acquisitions do not initially involve high levels of investment”⁵⁰ so that the expression “land investment” may be misleading. As this Chapter will discuss, the lack of implementation of many large-scale projects is particularly problematic and illustrates the point mentioned above: land acquisitions do not necessarily imply land investments. Although this point is relevant and well-substantiated by the results of empirical research, the literature still commonly refers to land investments and to investors within the context of large-scale land acquisitions.

A clear definition of large-scale land acquisitions has been put forward by Land Matrix, a global observatory on land acquisitions in the global South that collects empirical data on the scale of land transfers.⁵¹ In the database created by Land Matrix, large-scale land acquisitions are defined as all investments

made for agricultural production, timber extraction, carbon trading, industry, renewable energy production, conservation, and tourism in low- and middle-income countries [that] entail a transfer of rights to use, control or ownership of land through sale, lease or concession; have been initiated since the year 2000; cover an area of 200 hectares or more; imply the potential conversion of land from smallholder production, local community use or important ecosystem service provision to commercial use.⁵²

This definition has the advantage of encompassing the multiple and complex legal forms in which the acquisitions take place and which vary across countries and legal

⁴⁹ Cotula, *The Great African Land Grab?: Agricultural Investments and the Global Food System*, 7.

⁵⁰ Anseuw et al., “Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project,” 21.

⁵¹ For further information on this database, see Chapter 1 on method.

⁵² www.landmatrix.org. Accessed 5 January 2017.

systems. Moreover, it refers to the change in land use, which according to some authors is central to the land acquisitions.⁵³

A similar definition was put forward by Schoneveld in one of his reports.⁵⁴ The Author focused on large-scale farmland acquisitions and defined them as agricultural and forestry investments involving transfer of use or ownership rights over contiguous areas of land larger than 2000 hectares, for which the transfer was finalized after 2005.

It should also be noted that the expression “land grab” was especially used in the early literature discussing the rush for land. In the first years of discussion and analysis, the critics used the expression “land grab,” whereas the proponents referred to land acquisitions or land investments. In particular, the influential study by the World Bank on the rising interest in farmland focused on the opportunities of agricultural investments and, together with other studies, called for a better regulation of land investments to reduce their negative impact. After the first publications, and with the better analytical understanding that was provided by subsequent in-depth research, a majority of the ongoing research now refers to “large-scale land acquisition” or “land investments” and the expression “land grab” is mostly used by activists. As Dell’Angelo and others noted,

a problem with the term land grabbing is that it is normative and politically charged and refers to a phenomenon that can be assessed very differently according to different perspectives and interests.⁵⁵

In line with these considerations, the present work does not refer to “land grab” either, as this expression lacks analytical clarity and is difficult to operationalize for the purpose of field research. Therefore, and in agreement with this tendency in the

⁵³ Borras Jr and Franco, "Global Land Grabbing and Trajectories of Agrarian Change: A Preliminary Analysis"; Hall, "Land Grabbing in Southern Africa: The Many Faces of the Investor Rush."

⁵⁴ George Schoneveld, "The Anatomy of Large-Scale Farmland Acquisitions in Sub-Saharan Africa," in *CIFOR Working Papers* (Bogor: Center for International Forestry Research, 2011)

⁵⁵ Jampel Dell'Angelo et al., "The Tragedy of the Grabbed Commons: Coercion and Dispossession in the Global Land Rush," *World Development* 92 (2017): 2.

literature, the present work refers to “large-scale land acquisitions” and focuses to agricultural investments by adopting the abovementioned definition provided by Schoneveld.⁵⁶ This terminological choice does not aim to downplay the political dimension of the phenomenon; to the contrary, the latter is carefully taken into account through an analysis of the distributive consequences of land acquisitions and therefore through a political analysis focused on the local level, rather than on the international one. While keeping in mind the important distinction between land investments and land acquisitions mentioned above, this work will refer interchangeably to land investments as well as large-scale land acquisitions due to the often-ambiguous nature of individual transactions.

The following Section will discuss the evolution of the literature on large-scale land investments and it will shed some light on the data currently available.

IV. The Two Phases in the Literature

The literature on the global rush for land has been particularly prolific—to the extent that it has been referred to as a “literature rush”⁵⁷ and a “veritable deluge... of op-eds, reports..., scholarly papers, books..., and articles in leading social science and general science journals”⁵⁸—and has rapidly provided a thorough analysis of the complexity of this phenomenon.

As some authors noted, in the early years of the land rush the research aimed at fostering a broader debate on land acquisitions and at influencing the political agenda

⁵⁶ George Schoneveld, "The Anatomy of Large-Scale Farmland Acquisitions in Sub-Saharan Africa," in *CIFOR Working Papers* (Bogor: Center for International Forestry Research, 2011)

⁵⁷ Ian Scoones et al., "The Politics of Evidence: Methodologies for Understanding the Global Land Rush," *Journal of Peasant Studies* 40, no. 3 (2013): 469.

⁵⁸ Marc Edelman, "Messy Hectares: Questions About the Epistemology of Land Grabbing Data," *Journal of Peasant Studies* 40, no. 3 (2013): 486.

on land and development.⁵⁹ In particular, the first phase of literature was animated by policy institutes, international organizations, and non-governmental organization as well as engaged researchers who analyzed the key characteristics of the global rush for land by looking at scale, key drivers, and social and economic consequences in the global South. In the early years of literature, the availability of data on land investments was relatively low: media provided the bulk of the information and it was then corroborated by country-specific field research which, however, did not yet provide a consistent picture.

The subsequent figures announced by reports and studies varied significantly: the World Bank reported land investments for 56 million hectares globally between 2007 and 2009;⁶⁰ Oxfam claimed that between 2001 and 2011 more than 227 million hectares had been acquired by foreign investors;⁶¹ whereas Anseuw and others, in the framework of an international research, pointed to 203 million hectares acquired worldwide between 2000 and 2011.⁶² In addition to these figures, many other studies made attempts to provide reliable data on the acquisition of land by foreign actors.⁶³

The divergence in the data can be explained by the lack of a common definition of “land grab” or “land acquisition,” which the previous Section discussed. Moreover, most of the transactions are not public, so it is difficult to obtain details on the size of the acquisitions. The secrecy that surrounds these acquisitions has been widely criticized by the literature and, as Section VI will illustrate, it has also been at the center

⁵⁹ Ian Scoones et al., "The Politics of Evidence: Methodologies for Understanding the Global Land Rush," *Journal of Peasant Studies* 40, no. 3 (2013).

⁶⁰ Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*.

⁶¹ Oxfam, "Land and Power: The Growing Scandal Surrounding the New Wave of Investments in Land."

⁶² Anseuw et al., "Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project."

⁶³ See for example: Schoneveld, "The Anatomy of Large-Scale Farmland Acquisitions in Sub-Saharan Africa"; Lorenzo Cotula et al., "Agricultural Investment and International Land Deals: Evidence from a Multi-Country Study in Africa," *Food Security* 3, no. 1 (2011).

of the policy discussion as well as new Guidelines on land adopted by FAO.⁶⁴ In addition to this, most of the countries targeted by investors do not have public records nor official statistics on the incoming investments and land transactions, so that the gathering of data is extremely difficult and depends heavily on extensive fieldwork. Notwithstanding the divergence in the data, most studies pointed to the centrality of sub-Saharan Africa in the land rush and a consensus has subsequently emerged pointing to the fact that most of acquisitions have taken place there.⁶⁵

This focus on the scale and on the figures characterized the first phase of literature on land investments and it provided the basis for the subsequent analysis (which I will refer to as the “second phase” of literature) – as it formed the empirical evidence on which the literature relied on. Moreover, by focusing on the drivers and the causes of the land rush, together with its consequences at the local level, the early literature contributed to fostering policy debate at the international level. The proliferation of studies on “land grabs” lead international institutions to consider the opportunity of addressing these issue with regulatory instruments, as Section VI will discuss.

As mentioned earlier, in the first years the debate was particularly divided between the advocates of land investments and their critics. In this context, the World Bank study⁶⁶ and the Institute for Food Policy Research report⁶⁷ suggested that the

⁶⁴ See for example: Cotula, "Land Deals in Africa: What Is in the Contracts?"; Ward Anseeuw et al., "Creating a Public Tool to Assess and Promote Transparency in Global Land Deals: The Experience of the Land Matrix," *Journal of Peasant Studies* 40, no. 3 (2013).

⁶⁵ Some authors noted that the emphasis on sub-Saharan Africa may be the result of a “selection bias” and may be due to the extensive media coverage that land acquisitions in this continent received (Ian Scoones et al., "The Politics of Evidence: Methodologies for Understanding the Global Land Rush," *Journal of Peasant Studies* 40, no. 3 (2013)).

⁶⁶ Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*.

⁶⁷ Von Braun and Meizen-Dick, "“Land Grabbing” by Foreign Investors in Developing Countries: Risks and Opportunities."

“rising interest in farmland”⁶⁸ could provide development opportunities to the countries of the global South. According to these studies, the acquisition of land could improve productivity and foster technology transfer while at the same time providing employment opportunities at the local levels. The opposite view was put forward by many studies that provided a darker picture of the impact of the land rush: in particular, many authors emphasized the social and economic consequences of land dispossession and analyzed the human rights violations associated with some of the land acquisitions.⁶⁹ Both these streams of literature, i.e., the proponents and the critics of land investments, agreed on the necessity of international regulations to tackle the phenomenon: on the one hand to facilitate it, and on the other to prevent its negative consequences.

From a theoretical perspective, this emphasis on the need for better regulation of land acquisitions reflects international liberal theory, which sees international law as constraining state behavior as a result of the membership in the international community.⁷⁰ This liberal perspective, which aimed at introducing better rules for land acquisitions, was extremely influential in the international policy debate and, as Section VI will discuss, it led to the introduction of several international non-binding instruments to regulate land acquisitions.

Only a minority within the literature rejected the dominant liberal approach and radically questioned the opportunity of introducing new regulatory instruments for land

⁶⁸ Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*.

⁶⁹ Lorenzo Cotula, "Commercial Pressures and Legal Rights: The Trouble with the Law Regulating Agricultural Investment in Africa," *QA - Rivista dell'Associazione Rossi-Doria* 2 (2013); De Schutter, "How Not to Think About Land-Grabbing: Three Critiques of Large-Scale Investments in Farming."

⁷⁰ A discussion of liberal theory in international relations is beyond the scope of this work. Liberal theory is multi-faceted and a lot has been written on the role of international law and on the motivations of states to engage in a constructive dialogue with the other members of the international community. For a review of the main positions in this field, see: Anne-Marie Slaughter and Jose E. Alvarez, "A Liberal Theory of International Law," *Proceedings of the Annual Meeting (American Society of International Law)* 94 (2008).

acquisitions. Some authors noted that alternatives to large-scale land acquisitions would be preferable, as the agrarian model that these imply does not produce pro-poor outcomes but rather reinforce the dependency of the global South.⁷¹ Moreover, the critics of the liberal approach emphasized the need for an endogenous and self-determined development, driven by the needs of the country rather than by those of international markets.⁷²

The first phase of literature described above focused on capturing the data and the evidence and at the same time on influencing the policy debate by advocating a change in the regulatory environment. A change in the focus of the research was stimulated by some of the leading authors in the field, who called for a new approach to land acquisitions. In 2013 Scoones and other wrote that

work on ‘land grabbing’ has reached a critical juncture. The early urgency of the 2008–2012 period has perhaps passed, the debate has definitely risen up the political agenda, and now there is a need to reflect, challenge and reframe, nuancing and sometimes confronting existing narratives.

In the same article, the author called for a new phase of research “which builds on the first phase ..., refines methods, concepts and criteria, and establishes new norms and systems for sampling, recording and updating information.”⁷³ This call was corroborated by other authors, who advocated a more rigorous empirical research and acknowledged the limitations of the existing studies by pointing at the difficulties in capturing the impact of land acquisitions:

Firstly, while adverse impacts tend to be concentrated at the initial stages of project implementation (e.g. loss of local land rights), some of the claimed benefits (e.g. public revenues, employment) will only fully materialise in the future once investment projects are operating at full scale. Secondly, case study evidence is

⁷¹ Borras and Franco, "From Threat to Opportunity? Problems with the Idea of a ‘Code of Conduct’ for Land-Grabbing."

⁷² De Schutter, "How Not to Think About Land-Grabbing: Three Critiques of Large-Scale Investments in Farming."

⁷³ Ian Scoones et al., "The Politics of Evidence: Methodologies for Understanding the Global Land Rush," *Journal of Peasant Studies* 40, no. 3 (2013): 480.

strongest on local impacts, and less strong on wider economic impacts, which would require a different set of methodologies.⁷⁴

These interventions triggered a broader debate on method and resulted in the deceleration of the pace of publications on land acquisitions, together with their change. Less focused on the scale and figures or on “making sense”⁷⁵ of the data, more studies analyzed investment cases and compared them in order to better understand the differences between the countries. Some studies connected land acquisitions to broader issues of land tenure and agrarian reform in the global South.⁷⁶ Also, more meta-studies and literature reviews were published,⁷⁷ which indicates that—after the literature rush of the early years—a need to systematize the existing studies emerged.

This second phase of literature appears less “engaged” in the fight against land acquisitions or the campaign to regulate them, but more interested in understanding the dynamics at play and grasping the continuities with the past that this phenomenon displays. In this literature, a consensus seems to have emerged on the rapid pace of the acquisitions and on the challenges it poses. Moreover, the drivers of the investments are no longer discussed as more attention is paid instead to the process of unfolding of investments. After the “hype,”⁷⁸ this second phase appears therefore more mature and less militant and provides a stronger analysis of the differences between the types of investments and the host countries.

⁷⁴ Ward Anseeuw, “The Rush for Land in Africa: Resource Grabbing or Green Revolution?,” *South African Journal of International Affairs* 20, no. 1 (2013): 165.

⁷⁵ Scoones et al., “The Politics of Evidence: Methodologies for Understanding the Global Land Rush,” 480.

⁷⁶ Lorenzo Cotula, “Land Tenure Issues in Agricultural Investments,” in *State of Land and Water Background Thematic Reports* (Food and Agriculture Organization, 2011); Schoneveld, “The Anatomy of Large-Scale Farmland Acquisitions in Sub-Saharan Africa.”

⁷⁷ See for example: Hans Holmén, “Is Land Grabbing Always What It Is Supposed to Be? Large-Scale Land Investments in Sub-Saharan Africa,” *Development Policy Review* 4, no. 33 (2015); Dell’Angelo et al., “The Tragedy of the Grabbed Commons: Coercion and Dispossession in the Global Land Rush.”

⁷⁸ Annelise Zoomers and Mayke Kaag, eds., *The Global Land Grab: Beyond the Hype* (London: Zed Books, 2014).

The separation between the two phases of literature is obviously a simplification, but it allows to identify the changes in the literature and to address the limitations of the research on land acquisitions. In both these phases, several sub-streams can be further identified, which focus on different aspects of land acquisitions: the human rights approach, which focuses on the human rights violations derived from land acquisitions; the development approach, which focuses on the development implications; the political economy approach, which focuses on the broader implications; and the tenure security one, which analyzes the land tenure regimes underlying the land deals.⁷⁹ Although all these streams of literature are strongly connected, it is to the last one that this dissertation aims to contribute by exploring the land tenure regimes of Ghana and Zambia and discussing the ongoing process of land investment in light of their specificities.

V. The Drivers of the Global Land Rush

As discussed above, the first phase of literature focused extensively on the drivers of land investments, in an attempt to understand the causes of this tendency. Foreign acquisitions of land are a centuries-old phenomenon that date back to the *conquista* and the colonization process through which European states became world empires.⁸⁰ Moreover, the expansion of cultivated land has been constant over the years: the World

⁷⁹ Within this literature, some authors have emphasized that large-scale land acquisitions are facilitated by weak land tenure systems in which local land users are not protected. See for example: Liz Alden Wily, "Looking Back to See Forward: The Legal Niceties of Land Theft in Land Rushes," *Journal of Peasant Studies* 39, no. 3-4 (2012); Lorenzo Cotula, "Commercial Pressures and Legal Rights: The Trouble with the Law Regulating Agricultural Investment in Africa," *QA - Rivista dell'Associazione Rossi-Doria* 2 (2013)

⁸⁰ For an historical perspective on land acquisitions and, more generally, on the processes of dispossession, see: Alden Wily, "Looking Back to See Forward: The Legal Niceties of Land Theft in Land Rushes."

Bank estimates that between 1990–2007 it expanded by 1.9 million hectares per year.⁸¹ According to the majority of the literature, it has been ignited by the combination of three crises: the food crisis, the financial crisis, and the oil crisis.

The literature agrees on the key role played by the 2007 and 2008 food crisis in the increased interest in farmland and the explanations for these two phenomena are tightly intertwined.⁸² This surge in food prices has been the object of many studies and different explanations of its causes have been put forward in the literature.⁸³ Some authors have emphasized the role of financial speculation in the price hikes by noting that neither the global demand for food nor global food production have varied significantly.⁸⁴ However, contrary to this the majority of studies have pointed to the increased demand and the reduced supply to explain the price hikes. By focusing on the demand side, some authors noted that the constant increase in the world population, together with the fast economic growth of many developing countries has raised the global demand for food and contributed to the increase in the prices.⁸⁵ By analyzing the supply side, other studies have argued that agricultural productivity has not improved significantly in the past decade, so that agricultural output has not increased as expected.⁸⁶

⁸¹ Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*, 27.

⁸² See among others: Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*; Hallam, "Foreign Investment in Developing Country Agriculture: Issues, Policy Implications and International Response"; GRAIN, "Seized! The 2008 Land Grab for Food and Financial Security."

⁸³ A detailed account of the causes of the food crisis is beyond the scope of this work. For further references on this topic see footnote no. 2.

⁸⁴ Akram-Lodhi, "Contextualizing Land Grabbing: Contemporary Land Deals, the Global Subsistence Crisis and the World Food System"; Mauro Conti, "Agrofinancialization: Food Price Volatility and Global Value Chain," in *Right to Food and Nutrition Watch 2012: Who Decides About Global Food and Nutrition? Strategies to Regain Control*, ed. FIAN international (Heidelberg: FIAN international, 2012). On the role of financial speculation in agriculture on food production, see also: Luigi Russi, *In Pasto Al Capitale. Le Mani Della Finanza Sul Cibo* (Roma: Castelvecchi, 2014).

⁸⁵ Brown, "The New Geopolitics of Food."

⁸⁶ Kenneth G. Cassman, "What Do We Need to Know About Global Food Security," *Global Food Security* 1 (2012).

Additional explanations have been put forward to understand the sudden increase in the price of food. According to many authors the increase in the price of oil which continued until 2008—once again linked to rapid economic growth in the global South—has triggered an increase in the production of renewable resources and in particular of bio-fuels. In this view, the increased cultivation of sugar-cane, soy, jatropha and other fuel-crops has triggered a reduction in the investments in food production, and therefore contributed to the increase in food prices due to a reduction in the supply.⁸⁷

As mentioned above, the food crisis and the increased farmland acquisitions are strongly connected, as unanimously acknowledged by the literature. The sudden increase in food prices “shook the assumption that the world will continue to enjoy low food prices.”⁸⁸ According to many political economists, the price volatility induced food-imports dependent countries, i.e., countries that rely on imports to satisfy the internal demand for food, to invest in land to ensure their food security by enhancing off-shore agricultural production.⁸⁹ In 2007 and 2008, some food producing countries like India, Indonesia and Thailand resorted to export restrictions to prevent the internal risk of food insecurity determined by the increased food prices.⁹⁰ As such, the food prices volatility challenged food-insecure countries, such as the Gulf countries: as Hallam clarified,

for richer countries, the concern is not so much the price of imported food as its availability... Where increasing food self-sufficiency is not a plausible option

⁸⁷ John Anthony Allan et al., *The Routledge Handbook of Land and Water Grabs in Africa* (London: Routledge, 2013).

⁸⁸ Zoomers, "Globalisation and the Foreignisation of Space: Seven Processes Driving the Current Global Land Grab," 434.

⁸⁹ In particular, many authors have focused on the role of Gulf countries in the investments. See for example: Allan et al., *The Routledge Handbook of Land and Water Grabs in Africa*.

⁹⁰ Brown, "The New Geopolitics of Food."

investment in food production overseas is seen as one possible element of a food security strategy.⁹¹

The role of food-import dependent countries in the rush for land has been the emphasized by reports and studies in the first phase of the literature. Many studies referred to “resource-poor” and “finance-rich” countries to indicate in particular the Gulf countries and focused on the role of their sovereign funds in overseas farmland acquisitions. As an example of this, the Initiative for Saudi Agricultural Investment Abroad, which was started in 2008 by King Abdullah, explicitly encourages farmland investments overseas to increase the internal food security.⁹² As such, many studies have scrutinized Saudi investments in agriculture, particularly in countries like Soudan and South Sudan.⁹³ In the early years of the land rush, the role of the Gulf countries has been most likely over-emphasized, also due to the fact that the media reported numerous large-scale land acquisitions guided by sovrein funds from this area. However, the role of Gulf countries and their sovereign funds has been reassessed by the most recent research, which to the contrary points to the centrality of European private investors in the rush for land.⁹⁴ Some large investments from the Gulf have been in the spotlight due to their announced size, but research has shown that the majority of farmland acquisitions are carried out by European private actors⁹⁵ – and the field research illustrated in this work confirms this. The literature noted that the food crisis triggered

⁹¹ Hallam, "Foreign Investment in Developing Country Agriculture: Issues, Policy Implications and International Response," 2.

⁹² For a critical analysis of this initiative, see: Howard Mann and Carin Smaller, "Foreign Land Purchases for Agriculture: What Impact on Sustainable Development?," in *Sustainable Development Innovation Brief* (New York: United Nations, 2010).

⁹³ Clemens Hoffmann, "The Contradictions of Development: Primitive Accumulation and Geopolitics in the Two Sudans," in *The Routledge Handbook of Land and Water Grabs in Africa*, ed. John Anthony Allan, et al. (London: Routledge, 2013); Harry Verhoeven, "Sudan and Its Agricultural Revival: A Regional Breadbasked or Another Mirage in the Desert?," *The Routledge Handbook of Land and Water Grabs in Africa*, ed. John Anthony Allan, et al. (London: Routledge, 2013).

⁹⁴ Kerstin Nolte, Wytke Chamberlain, and Markus Giger, *International Land Deals for Agriculture. Fresh Insights from the Land Matrix: Analytical Report II* (Bern, Montpellier, Hamburg, Pretoria: Centre for Development and Environment, University of Bern; Centre de coopération internationale en recherche agronomique pour le développement; German Institute of Global and Area Studies; University of Pretoria; Bern Open Publishing, 2016).

⁹⁵ *Ibid.*

the interest of private investors who, thanks to the sudden increase in the prices of food, realized that land investments had significant yield potential.⁹⁶

As mentioned above, the drivers of the land rush and of the food crisis are closely intertwined. As such, many authors pointed to the role of bio-fuels in the increased interest in farmland.⁹⁷ In the early 2000s, the demand for bio-fuel increased and some countries saw farmland acquisitions increase to introduce bio-fuels production. Moreover, some studies have argued that the environmental policies of the European Union, which also encourage the use of bio-fuels, increased the demand for these crops and contributed to the land rush in the global South.⁹⁸ As noted by FAO,

between 2000 and 2009, the consumption of vegetable oil for all purposes grew at an annual rate of 5.1 percent, while the consumption of vegetable oil for biofuel production grew at an annual rate of 23 percent.⁹⁹

In line with this, and especially in sub-Saharan Africa, large tracks of land got acquired by foreign companies to produce bio-fuels thus increasing the pressure on land by introducing competitive non-food crops. The field research, as the following chapters will discuss, confirmed this trend, especially with regards to Ghana where several biofuel investments were identified and one of them was included in the study.

Alongside the food and the energy crisis, the financial crisis that hit the Western world from 2007 onwards was according to many studies a key driver of land

⁹⁶ Akram-Lodhi, "Contextualizing Land Grabbing: Contemporary Land Deals, the Global Subsistence Crisis and the World Food System"; Philip McMichael, "The Land Grab and Corporate Food Regime Restructuring," *Journal of Peasant Studies* 39, no. 3-4 (2012).

⁹⁷ Saturnino M. Borras, Philip McMichael, and Ian Scoones, "The Politics of Biofuels, Land and Agrarian Change: Editors' Introduction," *Journal of Peasant Studies* 37, no. 4 (2010); Sonja Vermeulen and Lorenzo Cotula, "Over the Heads of Local People: Consultation, Consent, and Recompense in Large-Scale Land Deals for Biofuels Projects in Africa," *The Journal of Peasant Studies* 37, no. 4 (2010).

⁹⁸ Carroccio et al., "The Land Grabbing in the International Scenario: The Role of the Eu in Land Grabbing."

⁹⁹ Food and Agriculture Organization, *Foreign Land Investment in Developing Countries: Contribution or Threat to Sustainable Development?*, 34.

investments abroad.¹⁰⁰ In a period of financial instability and fluctuations of financial assets, investments in land offered a safer and more reliable alternative, since they guarantee a lower but stable return. Therefore, as the World Bank noted, the financial crisis brought about a “rediscovery’ of the agricultural sector by different types of investors.”¹⁰¹ The financial turmoil, together with the expectations of increasing rates of return in the agricultural sector linked to the increase in the food prices, triggered the interest of investors who, as Zoomers wrote, “see investment in foreign farmland as an important new source of revenue.”¹⁰²

In combination with the increase in the demand for land, which derived from the convergence of the food, energy, and financial crisis described above, many studies argued that one of the leading drivers of the land rush was the availability, although contested by some authors, of a large supply of unused or underused arable land. Thanks to satellite technology and to improved mapping tools, some studies have noted that developing countries have a large potential for agricultural expansion. In particular, an influential World Bank study analyzed the potential for farmland expansion in developing countries and calculated it by using complex agro-ecologic modelling. In this study, both Ghana and Zambia have been classified as countries with large potential for land expansion.¹⁰³ However, the effective availability of unused or underutilised land has been contested by some authors. This position will be further discussed in the next

¹⁰⁰ Akram-Lodhi, "Contextualizing Land Grabbing: Contemporary Land Deals, the Global Subsistence Crisis and the World Food System"; Allan et al., *The Routledge Handbook of Land and Water Grabs in Africa*; Cotula, "Commercial Pressures and Legal Rights: The Trouble with the Law Regulating Agricultural Investment in Africa."

¹⁰¹ Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*, XXV.

¹⁰² Zoomers, "Globalisation and the Foreignisation of Space: Seven Processes Driving the Current Global Land Grab," 435.

¹⁰³ Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*, 37.

Section, which will focus on the development potential of land acquisitions as well as explore the challenges posed by these investments as analyzed in the literature.

VI. Between Opportunities and Threats: A Review of the Impact and of the International Policy Response

As mentioned above, the impact of large-scale land acquisitions has been extensively discussed through empirical field research and meta-reviews. In the early phase of the literature, the majority of studies pointed to the dicotomy between the threats and the opportunities generated by land investments.

Some scholars saw large-scale land investments primarily as a development opportunity for the host country.¹⁰⁴ As many studies noted, the flow of official development aid (ODA) has decreased over the past twenty years.¹⁰⁵ Moreover, within ODA, the share of aid devoted specifically to agricultural projects has shrunk significantly from 18 percent in 1979 to 4.7 percent in 2007.¹⁰⁶ At the same time, structural adjustment policies significantly reduced the role of the State in the economy of developing countries. As such, the capacity of these governments to invest in agricultural development has been hampered; private investment is therefore seen by many scholars and policy makers as a solution to support the improvement of productivity and the expansion of the sector. This approach to private investment, seen as the engine of development in the lack of state resources, is in line with the development policies that started with the aforementioned structural adjustments in the

¹⁰⁴ Von Braun and Meizen-Dick, "'Land Grabbing' by Foreign Investors in Developing Countries: Risks and Opportunities."

¹⁰⁵ International Fund for Agricultural Development (IFAD), "Food Prices: Smallholder Farmers Can Be Part of the Solution," (2009). On the trends of public spending and aid in developing countries, see also: Saukar Fan, "Public Spending in Developing Countries: Trends, Determination and Impact," (Washington D.C.: International Food Policy Research Institute 2006).

¹⁰⁶ International Fund for Agricultural Development, "Food Prices: Smallholder Farmers Can Be Part of the Solution."

1970s and 1980s and continue today in the policy of the major donors.¹⁰⁷ In line with this, many countries have provided incentives to investors and made land available at very competitive prices through a diverse set of legal arrangements ranging from concessions to leases and outright purchases.¹⁰⁸ The next two chapters devoted to the case studies of Ghana and Zambia will illustrate the type of incentives to investors set in place to facilitate foreign investment in agriculture.

Consequently, large-scale land acquisitions have been welcomed by many scholars and policy makers who emphasized several potential positive impacts. First of all, many authors noted that large-scale land acquisition can contribute to poverty reduction by fostering economic development and creating employment in rural areas, both in farming as well as satellite activities.¹⁰⁹ This positive effect would be key to the development of host countries and would also contribute to achieving the Sustainable Development Goals agreed by the UN in 2015, which set the target of poverty eradication for the year 2030.¹¹⁰ Secondly, and on a broader scale, land investments could contribute to finance agricultural development and to increase food production in developing countries, thus in turn contributing to enhancing food security.¹¹¹ Thirdly, capital inflows linked to land investments could also contribute to technology transfer and therefore increase agricultural productivity which in sub-Saharan Africa has remained low for decades.¹¹² Fourthly, land investments could increase tax revenues of

¹⁰⁷ This issue will be discussed in the following Section devoted to land tenure.

¹⁰⁸ Cotula et al., "Agricultural Investment and International Land Deals: Evidence from a Multi-Country Study in Africa."

¹⁰⁹ Von Braun and Meizen-Dick, "'Land Grabbing' by Foreign Investors in Developing Countries: Risks and Opportunities."

¹¹⁰ United Nations General Assembly Resolution 70/2015, "Transforming Our World: The 2030 Agenda for Sustainable Development" (21 October 2015) A/RES/70/1, available from: http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E. Accessed 5 January 2017.

¹¹¹ Mann and Smaller, "Foreign Land Purchases for Agriculture: What Impact on Sustainable Development?"

¹¹² Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*; Hallam, "Foreign Investment in Developing Country Agriculture: Issues, Policy Implications and International Response."

the host country and thus contribute to its economic development. Similarly, they could bring about an improvement in infrastructures – especially if such investments are negotiated and the host countries require investors to contribute directly to this objective, for example by building or improving roads.¹¹³

All of the positive effects listed above can be summarized into economic growth and employment creation. Some authors have promoted the idea of a “win-win” scenario in which all the stakeholders involved in the land acquisition process could benefit: investors, local communities, and host countries as a whole.¹¹⁴ However, in some cases local communities opposed large-scale agricultural investments and resisted the acquisition of land by foreign actors. The episodes of resistance, of which the most famous one is the already mentioned Daewoo case in Madagascar, highlighted the problems posed by large-scale land acquisitions.¹¹⁵ Moreover, some governments cancelled part of the announced investments and renegotiated some of the agreements.¹¹⁶ These instances illustrate the controversial nature of foreign land investments, which have been thoroughly discussed in the literature.

The main threat posed by land investment is the dispossession of local land users, which has been documented by many studies.¹¹⁷ Such investments imply a change

¹¹³ Beth Robertson and Per Pinstrup-Andersen, "Global Land Acquisition: Neo-Colonialism or Development Opportunity?," *Food Security* 2.

¹¹⁴ Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*; Von Braun and Meizen-Dick, "'Land Grabbing' by Foreign Investors in Developing Countries: Risks and Opportunities."

¹¹⁵ Opposition to large-scale land investment has happened in several and well-documented cases across continents. The bottom-up resistance against land deals has been discussed by many authors and is beyond the scope of this work. For an overview of this aspect, see Elisa Greco, "Struggles and Resistance against Dispossession in Africa: An Overview," in *The Routledge Handbook of Land and Water Grabs in Africa*, ed. John Anthony Allan, et al. (London: Routledge, 2013).

¹¹⁶ As an example, for the cancellation of controversial projects in Madagascar and Ethiopia see footnotes 15 and 16.

¹¹⁷ See for example: Dell'Angelo et al., "The Tragedy of the Grabbed Commons: Coercion and Dispossession in the Global Land Rush"; Fouad Makki, "Power and Property: Commercialization, Enclosures, and the Transformation of Agrarian Relations in Ethiopia," *The Journal of Peasant Studies* 39, no. 1 (2012); Borras Jr and Franco, "Global Land Grabbing and Trajectories of Agrarian Change: A Preliminary Analysis."

in land use and are especially problematic in light of the distribution of wealth in the global South. Three quarters of the world's poor live in rural areas – and in sub-Saharan Africa more than 60 percent of the population lives in rural areas.¹¹⁸ Competing claims to access and use resources are even more crucial in similar contexts where land represents the main source of livelihood.¹¹⁹ As Merlet and Bastiansen point out, in this context “agrarian questions, particularly regarding access to and control of land and natural resources, thus remain key.”¹²⁰ Moreover, as the next Section will discuss, land is deeply embedded in rural societies and in sub-Saharan Africa it has a strong cultural and spiritual value. Land is also a safety net in most of the developing world, where communal land provides marginal resources such as fuelwood and medicinal plants that contribute to the livelihood of rural communities.¹²¹ For this reason, some authors have pointed to a new process of enclosure of the commons, and have used the British enclosures as a reference for the current wave of land investments.¹²² Notwithstanding the data concerning the large availability of farmland in the global South,¹²³ many studies noted that although population density in many of the host countries is low, land which is made available to investors is generally already in use, although such use is not

¹¹⁸ World Bank, World Development Indicators, "Rural Population in sub-Saharan Africa," 2014.

¹¹⁹ For a discussion of the increased competition for land in Africa, see: Liz Alden Wily, "‘The Law Is to Blame’: The Vulnerable Status of Common Property Rights in Sub-Saharan Africa," *Development and Change* 42, no. 3 (2011); Cotula, "Commercial Pressures and Legal Rights: The Trouble with the Law Regulating Agricultural Investment in Africa"; Pauline E. Peters, "Conflicts over Land and Threats to Customary Tenure in Africa," *African Affairs* 112, no. 449 (2013).

¹²⁰ Pierre Merlet and Johan Bastiaensen, "Struggles over Property Rights in the Context of Large-Scale Transnational Land Acquisitions. Using Legal Pluralism to Re-Politicize the Debate," in *Institute of Development Policy and Management Discussion Paper* (Antwerp: University of Antwerp, 2012), 8.

¹²¹ Vermeulen and Cotula, "Over the Heads of Local People: Consultation, Consent, and Recompense in Large-Scale Land Deals for Biofuels Projects in Africa."

¹²² Akram-Lodhi, "Contextualizing Land Grabbing: Contemporary Land Deals, the Global Subsistence Crisis and the World Food System"; Dell'Angelo et al., "The Tragedy of the Grabbed Commons: Coercion and Dispossession in the Global Land Rush."

¹²³ Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*.

formalized in legitimate land titles.¹²⁴ Moreover, many uses of land in the global South are not intensive, but still provide livelihood to the land users – like in the case of grazing animals and shifting cultivations. As Cotula noted,

the real issue is not that land is not used, but that the ways in which local people use the land may be treated as unproductive and backward, and that the claims of rural people to their land may not be properly recognized. Even where the land is not used to its full potential at a given point in time, this does not mean that it does not belong to anybody.¹²⁵

Research on several sub-Saharan countries, like Ghana, Ethiopia, Mozambique, and Zambia—which are amongst the key recipients of land investments—has pointed to the dispossession of local land users and to the lack of compensation for the land loss – or to insufficient compensation;¹²⁶ this trend has been confirmed by the present study, as the chapters on Ghana and Zambia will illustrate.

Moreover, as many studies pointed out, the decision making process that leads to large-scale land acquisition does not always imply the consultation of local communities and their free, prior and informed consent.¹²⁷ Empirical studies on this aspect have noted the lack of consultation in several countries including Ghana,

¹²⁴ Anseeuw et al., "Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project."

¹²⁵ Cotula, *The Great African Land Grab? Agricultural Investments and the Global Food System*, 86.

¹²⁶ See for example: Makki, "Power and Property: Commercialization, Enclosures, and the Transformation of Agrarian Relations in Ethiopia"; Madeleine Fairbairn, "Indirect Dispossession: Domestic Power Imbalances and Foreign Access to Land in Mozambique," *Development and Change* 44, no. 2 (2013); Dimuna Phiri, Jessica Chu, and Kathleen Yung, "Large-Scale Land Acquisitions and Development-Induced Displacement in Zambia: Lessons from Civil Society," paper presented at the 2015 *World Bank Conference on Land and Poverty* (Washington D.C. 2015); George Schoneveld, Laura German, and Eric Nutakor, "Land-Based Investments for Rural Development? A Grounded Analysis of the Local Impacts of Biofuel Feedstock Plantations in Ghana," *Ecology and Society* 16, no. 4 (2011). For a comparative analysis, see: Laura German, George Schoneveld, and Esther Mwangi, "Contemporary Processes of Large-Scale Land Acquisition in Sub-Saharan Africa: Legal Deficiency or Elite Capture of the Rule of Law?," *World Development* 48, (2013).

¹²⁷ Vermeulen and Cotula, "Over the Heads of Local People: Consultation, Consent, and Recompense in Large-Scale Land Deals for Biofuels Projects in Africa." The principle of free, prior and informed consent and its emergence under international law and in particular with regards to the rights of indigenous peoples are beyond the scope of this work. For an introduction to it, see: Tara Ward, "The Right to Free, Prior and Informed Consent: Indigenous People's Participation Rights within International Law," *Northwestern Journal of International Human Rights* 54 (2011).

Ethiopia, Tanzania, and Madagascar.¹²⁸ This aspect has been analyzed in particular by legal scholars, who have contributed to this interdisciplinary debate mostly by focusing on the human rights dimension of land investments. As De Schutter and others have observed, the vulnerability of local land users may expose them to forced evictions and this may infringe on their fundamental rights in many ways, including by threatenig their right to food.¹²⁹

By focusing on the right to food, some authors also noted that land investments generally entail production of biofuels, which accounts for the majority of land acquisitions – the rest being agri-food and timber projects.¹³⁰ As such, the potential positive impact of these investments on food security of the host countries would not materialize. On the role of bio-fuels and the threats their production poses to food security, many authors focused on key recipient countries like Ghana.¹³¹ In addition to the problems that bio-fuel production poses in terms of food security, the agri-food production brought about by land investments is generally export-oriented so it may not contribute to local food markets, but to the contrary worsen the vulnerability of local communities.¹³²

By critically reviewing the potential benefits of land investments, some authors argued that the employment opportunities on offer do not provide a sustainable

¹²⁸ Vermeulen and Cotula, "Over the Heads of Local People: Consultation, Consent, and Recompense in Large-Scale Land Deals for Biofuels Projects in Africa"; Cotula et al., "Testing Claims About Large Land Deals in Africa: Findings from a Multi-Country Study."

¹²⁹ Alden Wily, "'The Law Is to Blame': The Vulnerable Status of Common Property Rights in Sub-Saharan Africa"; Lorenzo Cotula, "Property Rights, Negotiating Power and Foreign Investment: An International and Comparative Law Study on Africa" (University of Edinburgh, 2009); De Schutter, "The Green Rush: The Global Race for Farmland and the Rights of the Land Users."

¹³⁰ Borras, McMichael, and Scoones, "The Politics of Biofuels, Land and Agrarian Change: Editors' Introduction."

¹³¹ Schoneveld, German, and Nutakor, "Land-Based Investments for Rural Development? A Grounded Analysis of the Local Impacts of Biofuel Feedstock Plantations in Ghana"; Festus Boamah, "Imageries of the Contested Concepts 'Land Grabbing' and 'Land Transactions': Implications for Biofuels Investments in Ghana," *Geoforum* 54 (2014).

¹³² De Schutter, "How Not to Think About Land-Grabbing: Three Critiques of Large-Scale Investments in Farming."

livelihood for local people, as the income they generate through low-skilled employment jobs is lower than the one generated by small-scale agriculture. As the World Bank noted when comparing large-scale and small-scale cultivation,

the data clearly indicate that, even though efficiency is comparable, smallholder cultivation has advantages on equity grounds. Smallholders' income is 2 times to 10 times what they could obtain from wage employment only.¹³³

Moreover, the critics of land acquisitions argued that the potential economic benefits for the host countries are not equitably distributed, but merely benefit the elites both at the national and local level.¹³⁴ The asymmetries of power at play in the unfolding of these investments have been highlighted by many authors, who see in this an additional danger in the ongoing land rush.¹³⁵ These asymmetries would be between the investors and the local community members, but also between local elites and other community members and they may contribute to the uneven distribution of benefits from the investment due to elite capture.¹³⁶ This risk has been identified in several comparative studies concerning sub-Saharan Africa¹³⁷ and it has been confirmed by the field research, as the next chapters will discuss.

In addition to the above, other authors have denounced the risk that the attraction of foreign investments becomes a race to the bottom in which developing countries

¹³³ Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*, 35.

¹³⁴ German, Schoneveld, and Mwangi, "Contemporary Processes of Large-Scale Land Acquisition in Sub-Saharan Africa: Legal Deficiency or Elite Capture of the Rule of Law?."

¹³⁵ Merlet and Bastiaensen, "Struggles over Property Rights in the Context of Large-Scale Transnational Land Acquisitions. Using Legal Pluralism to Re-Politicize the Debate."

¹³⁶ Lorenzo Cotula and Sonja Vermeulen, "Contexts and Procedures for Farmland Acquisitions in Africa: What Outcomes for Local People?," *Development* 54, no. 1 (2011); George Schoneveld, "Host Country Governance and the African Land Rush: 7 Reasons Why Large-Scale Farmland Investments Fail to Contribute to Sustainable Development," *Geoforum* (2016).

¹³⁷ Anseeuw et al., "Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project"; Cotula et al., "Testing Claims About Large Land Deals in Africa: Findings from a Multi-Country Study"; Laura German, George Schoneveld, and Esther Mwangi, "Contemporary Processes of Large-Scale Land Acquisition by Investors: Case Studies from Sub-Saharan Africa," in *Occasional Papers* (Bogor, Indonesia: Center for International Forestry Research 2011); Schoneveld, "Host Country Governance and the African Land Rush: 7 Reasons Why Large-Scale Farmland Investments Fail to Contribute to Sustainable Development."

lower their standards in order to triumph over competition from other developing countries.¹³⁸ As Palmer wrote

governments in Africa now find themselves under great pressure – and competing with each other – to open up to foreign investors in what, in an era of globalisation, is very much an investor's market.¹³⁹

This race to the bottom could prove particularly problematic in the realm of environmental law – and in fact many studies have denounced the threats to the environment that large-scale land investments may pose. As some authors noted, the competition to attract foreign investments in developing countries becomes inevitable in a context in which official development aid has drastically decreased and public resources have become less and less available.¹⁴⁰

As a general remark, the first wave of literature has been very critical of large-scale land investments and has highlighted many of the dangers they may pose. However, it is important to note that a thorough assessment of the long term impact of land acquisitions, which takes into account the macroeconomic impact of these investments, is not yet possible: this phenomenon is too recent and the data available is still not sufficient. As Djurfeldt noted,

it is a little too soon to judge the long-term consequences of the land grabbing epidemic that has swept the developing world. One of the more simple reasons for this is that it takes a long time from the point at which an investor enters into an agreement with the government of the country concerned - and (preferably) with the small farmers, herdsman and other concerned as well - until results become apparent. Very few of the agreements hitherto documented have reached the production stage as yet.¹⁴¹

Nevertheless, as shown above many studies have clearly identified the key problems with the unfolding of land investments and also tried to shed light on the key causes.

Numerous works have noted that state capacity in rural areas is limited, especially in the

¹³⁸ Cotula, *The Great African Land Grab?: Agricultural Investments and the Global Food System*.

¹³⁹ Robin Palmer, "Would Cecil Rhodes Have Signed a Code of Conduct? Reflections on Global Land Grabbing and Land Rights in Africa, Past and Present," paper presented at the *International Conference on Global Land Grabbing* (University of Sussex 2011).

¹⁴⁰ See footnote 105.

¹⁴¹ Djurfeldt, "Land Speculation and the Rights of the Poor: The Case of Sub-Saharan Africa," 19.

sub-Saharan context where state institutions are generally considered weak.¹⁴² As such, the outcomes of land investments in terms of wealth distribution may be unequal and the risks of elite captures high, due to the absence of state control over the investment process. In addition to this, many studies have argued that corruption contributes to favoring elites and it hinders the equal distribution of benefits to local communities.¹⁴³ Other authors instead have focused on the role of law in favoring large-scale land investments and in producing outcomes that do not improve the livelihood of local communities. According to Alden Wily, “the law is to blame”¹⁴⁴ – in the sense that the vulnerable status of local land rights would determine the ease through which land is acquired by investors. The next Section, which provides an overview of the debate on land tenure in sub-Saharan Africa, will delve into this aspect and identifies the ongoing challenges of land tenure in a historical perspective.

As mentioned above, many authors have emphasized the role played by law and regulations in the land debate and have called for a better regulation—both at domestic and international level—of land investments in light of the specificities of land management in the global South. This stream of literature has emphasized the role of legal institutions in producing just outcomes and it has been particularly influential in the international policy debate, which resulted into the adoption of some key documents by the World Bank and the Food and Agriculture Organization. As one of the very first policy reaction after the publication of the early reports denouncing the land rush, the

¹⁴² Tom Lavers and Festus Boamah, "The Impact of Agricultural Investments on State Capacity: A Comparative Analysis of Ethiopia and Ghana," *Geoforum*, no. 72 (2016).

¹⁴³ German, Schoneveld, and Mwangi, "Contemporary Processes of Large-Scale Land Acquisition in Sub-Saharan Africa: Legal Deficiency or Elite Capture of the Rule of Law?"

¹⁴⁴ Alden Wily, "'The Law Is to Blame': The Vulnerable Status of Common Property Rights in Sub-Saharan Africa."

World Bank adopted the "Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods, and Resources" (PRAI).¹⁴⁵

Although not binding on neither states nor private actors, these principles, which were redacted in conjunction with FAO, International Fund for Agricultural Development, United Nations Conference on Trade and Development, and other partners, emphasize the importance of transparency in land transactions together with the respect of existing local rights. In particular these seven principles address the respect of local land rights, of food security and require investors to consult local communities and to take into account the social and environmental sustainability of the projects. Some authors noted that the PRAI move from the assumption that “the anticipated positive outcomes of land deals can be achieved when such deals are carried out well.”¹⁴⁶ Through this policy initiative, the World Bank emphasizes the importance of institutions such as markets and property rights for the achievement of positive outcomes from land investments. In particular, principle number three focuses on the creation of "a proper enabling regulatory, legal and business environment"¹⁴⁷ and on good governance and transparency.

After a long process of dialogue with civil society, the FAO further elaborated on these principles and drafted a comprehensive non-binding framework, the Voluntary Guidelines for the Governance of Tenure of Land, Fisheries and Forest.¹⁴⁸ Agreed in May 2012, this document identifies the main challenges related to land tenure in the global South and it addresses them by requesting all the actors involved, i.e.,

¹⁴⁵ World Bank, "Principles for Responsible Agricultural Investment That Respects Rights, Livelihoods, and Resources," ed. World Bank (2010).

¹⁴⁶ Saturnino M. Borras, Jennifer C. Franco, and Chunyu Wang, "The Challenge of Global Governance of Land Grabbing: Changing International Agricultural Context and Competing Political Views and Strategies," *Globalizations* 10, no. 1 (2013): 169.

¹⁴⁷ World Bank, "Principles for Responsible Agricultural Investment That Respects Rights, Livelihoods, and Resources."

¹⁴⁸ Food and Agriculture Organization, "Voluntary Guidelines for the Governance of Tenure of Land, Fisheries and Forest," ed. Food and Agriculture Organization (2012).

states; implementing agencies; judicial authorities; local governments; organizations of farmers and small-scale producers, of fishers, and of forest users; pastoralists; indigenous peoples and other communities; civil society; private sector; academia; and all persons concerned.¹⁴⁹

to use and apply them. Like the World Bank principles, these Guidelines have been motivated by the political will to reduce the risks associated to land investments in order to promote better outcomes for all the actors involved, in what has been called a “win-win scenario.”

Most of the literature has welcomed the effort to systematize the measures that can improve the management of land and distribute the benefits deriving from land investments. If applied, the Guidelines would indeed provide a better protection to the rights of local communities and ensure that the unfolding of land investments is transparent and equitable. However, some authors have criticized the weakness of these voluntary instruments and noted that codes of conduct and other non-binding instruments are not game changers, as their application depends on the good will of the actors.¹⁵⁰ Until now, no comprehensive study of the application of these voluntary instruments has been conducted; although these instruments are often used by non-governmental organizations in their human rights advocacy (especially the Voluntary Guidelines), most of the investments analyzed in the field research pertaining to this dissertation did not comply with the provisions of the Guidelines.¹⁵¹

VII. Land Tenure in sub-Saharan Africa: A Complex Web of Norms

The contemporary debate on large-scale land acquisitions has reinvigorated the one on land tenure in Africa. As this continent is the most targeted from investors, the

¹⁴⁹ *Ibid.*, art. 2.3.

¹⁵⁰ Borras and Franco, "From Threat to Opportunity? Problems with the Idea of a 'Code of Conduct' for Land-Grabbing."

¹⁵¹ An assessment of the application of the Guidelines is beyond the scope of this work and was not the object of the interviews held in the field.

characteristics of land tenure systems are central to understanding the flow of investments and their unfolding. Simultaneously, the increased investment flow may in the long term produce a shift in land use patterns and therefore alter existing land tenure dynamics. As such, it is necessary to connect these fields of study in order to shed light on the current wave of investments.

The studies on land tenure in Africa have a long and interdisciplinary history that dates back to the anthropological research conducted during the colonial period.¹⁵² Starting from the 1960s, in the wake of decolonization, land tenure and land reform became central to the development agenda; research on land tenure was increasingly conducted by economists, lawyers, and social scientists.¹⁵³ These studies have shown the multifaceted and changing nature of land tenure in Africa and have generally drawn their attention to the customary dimension of land, which entails use patterns not aligned with Western ones.

Notwithstanding the specific characteristics of each region, which for Ghana and Zambia will be discussed in detail in the following chapters, the history of land tenure in Africa sees the coexistence of different authorities and norms which operate on the same territory. Albeit formally grounded in European land laws, African land tenure regimes are a complex web of plural sources where competing claims and rights coexist.¹⁵⁴ As recent research has shown, only a small fraction of African land, ranging

¹⁵² See for example: Max Gluckman, *Custom and Conflict in Africa* (Oxford: Oxford University Press, 1955); Vincent Liversage, *Land Tenure in the Colonies* (Cambridge: Cambridge University Press, 1945).

¹⁵³ See for example: Johnson, O.E.G., "Economic analysis, the legal framework and land tenure system," *Journal of Law and Economics* 15 (1972); Bentsi-Enchill, Kwamena, "Do African Systems of Land Tenure Require Special Terminology?," *Journal of African Law* 9, no. 2 (1965); Uchendu, V.C., "Some Issues in African Land Tenure," *Tropical Agriculture* 44, no. 2 (1967).

¹⁵⁴ See for example: Kojo Sebastian Amanor and Sam Moyo, eds., *Land and Sustainable Development in Africa* (London: Zed Books, 2008); Pauline E. Peters, "Challenges in Land Tenure and Land Reform in Africa: Anthropological Contributions," *World Development* 37, no. 8 (2009).

between 2 and 10 percent,¹⁵⁵ is covered by formal land titles: the remaining land is governed by customary tenure, in line with the pluralism of legal sources that characterizes African law.¹⁵⁶

The concept of land tenure can be defined as the “set of rules and practices specifying whom is to get access to land at which time in which place.”¹⁵⁷ As highlighted in the literature, this notion rejects disciplinary borders and calls for an integrated approach. As Meek pointed out,

the word tenure, from the Latin *tenere* = to hold, implies that land is ‘held’ under certain conditions. There are wide variations in these conditions... But land tenure cannot be studied solely from the legal standpoint. While in its narrowest sense it may be described as ‘the body of rules which govern the practice of cultivation and apportionment of produce, yet in its wider sense it covers... the whole relationship of man to the soil. This relationship on the one hand transforms the land, and on the other causes human beings to live together in families and other forms of social groupings, bound together by common work and common religious ritual and beliefs which serve as a kind of charter for the right to use the land. Thus the study of land tenure, besides being a study of agricultural economies, is also one of sociology.¹⁵⁸

The tight interconnection between land relations and social as well as political relations is at the core of the notion of land tenure. As pointed out in the literature, land tenure is inherently a social relation, due to the embeddedness of land in society.¹⁵⁹ This perspective has been adopted to analyse land tenure regimes and land relations in Zambia and Ghana.

Whereas in Europe the modernity shift between the 16th and 17th century brought about the paradigm of individual ownership over land, based on the individual right of

¹⁵⁵ Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*.

¹⁵⁶ Rodolfo Sacco et al., *Il Diritto Africano*, ed. Rodolfo Sacco, Trattato Di Diritto Comparato (Torino: UTET, 1995).

¹⁵⁷ Han Van Dijk, "Land Tenure, Territoriality, and Ecological Instability: A Sahelian Case Study," in *The Role of Law in Natural Resource Management*, ed. Joep Spiertz and Melanie G. Wiber (The Hague: VUGA, 1996), 18.

¹⁵⁸ C.K. Meek, *Land Law and Custom in the Colonies* (Oxford: Oxford University Press, 1946), 1.

¹⁵⁹ The reference here is to the seminal work of Polanyi: Karl Polanyi, *The Great Transformation. The Political and Economic Origins of Our Time* (New York, Farrar & Rinehart, 1944). For a discussion of the notion of land tenure and of its embeddedness, see: Peters, "Challenges in Land Tenure and Land Reform in Africa: Anthropological Contributions," 1318.

exclusion and enforced by state authority,¹⁶⁰ traditionally African land is not subject to individual rights, as it is endowed with sacral significance, and it is generally managed in the common interest by a single actor (the “chief”),¹⁶¹ who allocates and distributes it to groups or individual households.¹⁶²

In addition to customary land tenure, colonial powers introduced a new layer of norms to regulate land use.¹⁶³ As argued in the literature,¹⁶⁴ the extraction of natural resources required a change in land tenure regimes to ensure the centralization of management under state authority. The nationalization of “*terres sans maître*”¹⁶⁵ and “waste and unoccupied land,”¹⁶⁶ together with the introduction of the European concept of individual ownership, clashed with the customary layer of norms that prescribed the communitarian and inalienable nature of land rights.¹⁶⁷

The conflict between state and customary land tenure continued after independence. In light of the modernization objectives embraced by many African

¹⁶⁰ Emile Le Bris, Etienne Le Roy, and Paul Mathieu, eds., *L'appropriation De La Terre En Afrique Noire: Manuel D'analyse, De Décision Et De Gestion Foncières* (Paris: Karthala, 1996).

¹⁶¹ The literature on chieftaincy in Africa is extensive. It is sufficient here to recall Verdier's seminal work: "Chef De Tere Et Terre De Lignage: Contribution À L'étude Des Systèmes De Droit Foncier Négro-Africaines," in *Etudes De Droit Africain Et De Droit Malgache*, ed. Jean Poirer (Paris: Cujas, 1955).

¹⁶² Rodolfo Sacco, "The Sub-Saharan Legal Tradition," in *The Cambridge Companion to Comparative Law*, ed. Mauro Bussani and Ugo Mattei (Cambridge: Cambridge University Press, 2012).

¹⁶³ Marco Guadagni, *Il Modello Pluralista*, ed. Antonino Procida Mirabelli Di Lauro, Sistemi Giuridici Comparati (Torino: Giappichelli, 1996).

¹⁶⁴ See for example: Le Bris, Le Roy, and Mathieu, *L'appropriation De La Terre En Afrique Noire: Manuel D'analyse, De Décision Et De Gestion Foncières*; Kristin Mann and Richard Roberts, eds., *Law in Colonial Africa* (Portsmouth, NH: Heinemann, 1991).

The French civil code prescribed the nationalization of all the land not previously “owned”: the absence of individual ownership in the continent enabled the process of land expropriation. On the application of this concept in the French colonies, see Catherine Coquery Vidrovitch, "Le Regime Foncier En Afrique Noire," in *Enjeux Foncières En Afrique Noir*, ed. Emile Le Bris, Etienne Le Roy, and François Leimdorfer (Paris: Karthala, 1982).

¹⁶⁶ A critical discussion of the appropriation of land in British colonies may be found in: Hastings Winston Opinya Okoth-Ogendo, "The Tragedy of African Commons: A Century of Expropriation, Suppression and Subversion," in *Occasional Paper* (Cape Town: University of the Western Cape, 2002).

¹⁶⁷ Alden Wily, "'The Law Is to Blame': The Vulnerable Status of Common Property Rights in Sub-Saharan Africa."

states, customary tenure was considered an obstacle to the improvement of agricultural productivity. As Peters clearly wrote,

the conventional logic was/is that communal tenure entails an absence of individual rights and a domination of group rights, so that the individual land user faces insecurity of tenure which, in turn, constitutes a disincentive to the investment needed for increasing agricultural productivity and efficiency on which agricultural development and general social progress must be based.¹⁶⁸

This view was justified by the growing academic literature focused on the role of property rights in economic development, according to which security of tenure and individual property rights were needed to foster investments and promote the creation of fully-fledged market economies. This literature can be traced back to the seminal work of Demsetz, who contended that “a primary function of property rights is that of guiding incentives to achieve greater internalization of externalities”¹⁶⁹ and connected the creation of market economies to the allocation of individual property rights. In the same years, an influential biology paper on “the tragedy of the commons” contributed to strengthen the idea that resources held in common are inevitably subject to overuse and should therefore be either nationalized or privatized.¹⁷⁰

The implications of these studies on land tenure in Africa were significant, as land was not subject to formalized individual property rights. In light of this, and beginning in the early 1960s, security of tenure was at the core of many African development policies, which entailed ambitious programs of land rights formalization.¹⁷¹ Land titling initiatives were later prescribed as part of structural adjustment programs and supported theoretically by the influential work of De Soto. In line with the abovementioned studies of Demsetz and Hardin, the Peruvian economist argued that the

¹⁶⁸ Peters, "Challenges in Land Tenure and Land Reform in Africa: Anthropological Contributions," 1318.

¹⁶⁹ Harold Demsetz, "Towards a Theory of Property Rights," *American Economic Review* 57, no. 2 (1967): 348.

¹⁷⁰ Garrett Hardin, "The Tragedy of the Commons," *Science* 162, no. 3859 (1968).

¹⁷¹ Amanor and Moyo, *Land and Sustainable Development in Africa*.

formalization of property rights on land was key to economic development,¹⁷² and thus confirmed the importance of replacing customary land tenure with formal state-delivered entitlements. In this context, the circulation of foreign legal models and legal transplants played a central role.

Notwithstanding the fact that formalization policies were widely adopted, many authors argued that land titling programs in Africa failed to achieve their goals.¹⁷³ As numerous empirical studies have shown,¹⁷⁴ land registration initiatives

frequently exacerbated conflicts by ignoring overlapping and multiple rights and uses of land, and led to or reinforced patterns of unequal access to land based on gender, age, ethnicity, and class.¹⁷⁵

Moreover, the programs failed to formalize more than 90 percent of African land, which is still held under customary tenure.¹⁷⁶ In this pluralist setting, in many African countries most of the land is formally held by the State, due to the nationalization that took place in the colonial period or after independence, but the actual control over land is generally left to traditional authorities at the local level.

As such, it is clear that the framework on which the ongoing wave of investments operate is particularly complex and diverges significantly from the legal tradition of the global North. Therefore, these investments should be carefully assessed in light of local land tenure arrangements, which contribute to shaping their outcomes

¹⁷² Hernando De Soto, *The Mystery of Capital. Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books, 2000).

¹⁷³ See for example: Philippe Lavigne Delville, "Harmonising Formal Law and Customary Rights in French-Speaking Westafrica," in *Drylands Programme Issue Papers* (London: International Institute for Environment and Development, 1999); Philip Woodhouse, "African Enclosures: A Default Mode of Development?," *World Development* 31, no. 10 (2003).

¹⁷⁴ See among others: David A. Attwood, "Land Registration in Africa: The Impact on Agricultural Production," *World Development* 18, no. 5 (1990); Parker Shipton, "The Kenyan Land Tenure Reform: Misunderstandings in the Public Creation of Private Property," in *Development Discussion Paper* (Harvard Institute for International Development, 1987); Celestine Nyamu Musembi, "De Soto and Land Relations in Rural Africa: Breathing Life into Dead Theories About Property Rights," *Third World Quarterly* 28, no. 8 (2007).

¹⁷⁵ Peters, "Challenges in Land Tenure and Land Reform in Africa: Anthropological Contributions," 1318.

¹⁷⁶ Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*.

and to “bring about winners and losers,”¹⁷⁷ as the next chapters on Ghana and Zambia will show.

¹⁷⁷ Lorenzo Cotula, "Changes in "Customary" Land Tenure Systems in Africa," (London: International Institute for Environment and Development, 2007), 3.

Chapter 3:

Large-scale Land Acquisitions in Zambia

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I. Introduction

Over the past ten years, interest from international investors in agricultural land in Zambia has experienced a sharp upsurge. As several studies have shown, the pace of foreign land acquisitions in the country increased rapidly, although no official data on this phenomenon is available yet.¹ In 2014 the Government of Zambia undertook a land audit to map land use and land transactions across the country,² but the process is still ongoing and consequently no information on the outcomes is currently available. As a response to the reports that documented foreign acquisitions of land,³ the Government on several occasions announced counter-measures,⁴ and in March 2017 the President declared that the alienation of land to foreigners should stop in order to prevent the

¹ See for example: Laura German, George Schoneveld, and Esther Mwangi, "Contemporary Processes of Large-Scale Land Acquisition in Sub-Saharan Africa: Legal Deficiency or Elite Capture of the Rule of Law?," *World Development* 48, (2013); Jessica Chu, "Creating a Zambian Breadbasket - 'Land Grabs' and Foreign Investments in Agriculture in Mkushi District," in *LDPI Working Paper* (The Hague: Land Deals Politics Initiative, 2013); Kerstin Nolte, "Large-Scale Agricultural Investments under Poor Land Governance in Zambia," *Land Use Policy* 38, (2014); Dimuna Phiri, Jessica Chu, and Kathleen Yung, "Large-Scale Land Acquisitions and Development-Induced Displacement in Zambia: Lessons from Civil Society," paper presented at the 2015 *World Bank Conference on Land and Poverty* (Washington D.C. 2015).

² Bruce Chooma to Zambian Economist: Information, Ideas and Influence 2014, <http://www.zambian-economist.com/2014/09/zambias-chaotic-land-administration.html>. Accessed 6 May 2017.

³ See footnote no. 1.

⁴ "Govt. Committed to Fighting Illegal Land Allocation," *Lusaka Voice*, 27 February 2013; "Government Bans the Sale of Customary Land with Immediate Effect," *Lusaka Times*, 10 December 2014.

country's children from being left landless.⁵ These declarations show the widespread concern surrounding land deals, notwithstanding the lack of official data on them.

The field research conducted in the country aimed to identify the process through which foreign investors may access land – and to highlight the main challenges that these investments pose. This Chapter is based on a review of legal documents and literature as well as on field research conducted between January and March 2015.⁶ Semi-structured interviews were conducted in Lusaka, the capital, to identify large-scale investments in the country. Three rural districts were subsequently visited: Serenje and Mumbwa, located in the Central Province, and Kazungula, located in the Southern Province. Key informants in these districts included government officers, traditional leaders, and international investors. Ongoing and perspective large-scale investments were analyzed and a focus group discussion with affected community members was held. Official documents and data on foreign agricultural investment were also collected and analyzed. No district in the Western Province of the country was included in the study, where the different historical path led to a different role for chiefs in land management.⁷

The Zambia Development Agency (ZDA), who provided contact details for investors, district officers and traditional leaders, facilitated access to the field. The other informants were identified locally thanks to the input of district authorities. The remote location of some of the investment areas made contact with local communities challenging. However, focus groups with community members were organized in Mumbwa and Serenje and involved about 10 participants each. Three companies

⁵ "Government to Revise Land Act and Land Policy," *Lusaka Times*, 17 March 2017.

⁶ See Chapter 1.

⁷ On the law and customs of Barotseland, the current Western Province, see: Max Gluckman, *The Ideas in Barotse Jurisprudence* (Manchester: Manchester University Press, 1965). On the land tenure system in the Western province, see Fredrick S. Mudenda, *Land Law in Zambia* (Lusaka: University of Zambia Press, 2007).

participated in the research and were willing to disclose information on the process through which they acquired land as well as more general information relating to their operations. However, none of the companies disclosed contracts or documents. Traditional leaders were also reluctant to disclose documents. Although they often referred to “written agreements” with the investors,⁸ access to these documents were never granted.

The following sections of this Chapter will introduce key features of the Zambian land tenure system by first looking at the history of the country. The agricultural investment trends will then be briefly discussed, followed by an analysis of the process through which land is alienated to investors based both on existing literature as well as field research. Particular focus will be placed on large-scale acquisitions of customary land in light of the fact that it constitutes the majority of land in Zambia. The Chapter will then discuss the results of the field research and highlights the key findings, with emphasis on the challenges posed by large-scale land investments in a legal pluralist context. Finally, some concluding remarks will summarize the findings discussed in the Chapter.

II. From Colonial to Contemporary Zambia: A Tale of Two Land Tenure Systems

Prior to assessing the current state of land acquisitions, it is important to provide a brief historical overview. The encounter between the British administration and the local

⁸ Attorney and Land Law Practitioner, interview no. 9, Lusaka, 4 February 2015; Company A, Director, interview no. 13, Serenje, 11 February 2015; Chief A, interview no. 14, Chibale, 12 February 2015; Company B, Officers, interview no. 20, Mumbwa, 19 February 2015; Chief B, interview no. 21, Mumbwa, 20 February 2015; Company C, Officers, interview no. 22, Lusaka, 22 February 2015. The existence of written agreements between chiefs and investors has been confirmed in the literature; see for example: Nolte, "Large-Scale Agricultural Investments under Poor Land Governance in Zambia."

population dates back to the late 19th century. The current territory of Zambia includes the former protectorates of North-Eastern Rhodesia and North-Western Rhodesia, both created in 1889.⁹ The two protectorates were initially administered by the British South Africa Company, which was incorporated through a Royal Charter in the same year. In line with its mandate, the Company obtained the right to extract minerals in the region by means of concessions from chiefs and Kings¹⁰—the legality of which is disputable.¹¹ No express provision was made with regards to land ownership, but the Company *de facto* controlled the natural resources of the two protectorates.

In 1911 the Northern Rhodesia Order in Council merged the protectorates into a single entity, Northern Rhodesia, and confirmed their administration by the Company. In this period, no express provision was made to vest the land in the Company: in line with the local agreements, the territories in Barotseland¹² remained under the authority of the King, whereas in the rest of the protectorate, as Mudenda noted, the rights of natives to occupy land were protected in that “they could not be removed or displaced except after inquiry and order of the Administrator approved by the High Commissioner.”¹³

In 1924 the Secretary of State for the colonies and the Company signed the Devonshire Agreement that transferred the control over the territory of Northern Rhodesia to the Crown, which was represented by the Governor.¹⁴ The Company

⁹ Mudenda, *Land Law in Zambia*.

¹⁰ The British South Africa Company obtained concessions from the Lozi King in the Southern and Western Province, in exchange for revenues and military protection (Taylor D. Scott, *Culture and Customs of Zambia* (London: Greenwood Press, 2006)). Land tenure in the Western Province was harmonized with the rest of the country only in 1970, when it was transformed into native reserves and native trust lands (Mphanza P. Mvunga, *The Colonial Foundations of Zambia's Land Tenure System* (Lusaka: National Education Company of Zambia, 1980).

¹¹ C.K. Meek, *Land Law and Custom in the Colonies* (Oxford: Oxford University Press, 1946)

¹² The territory of Barotseland roughly corresponds to the current Western Province.

¹³ Mudenda, *Land Law in Zambia*, 364.

¹⁴ Mudenda, *Land Law in Zambia*.

retained its rights over minerals in the country whilst surrendering control over land, with the exception of some areas over which it held freehold title.¹⁵

The Roots of the Contemporary Tenure System: Land Tenure in Northern Rhodesia

The first legal document to regulate land ownership in colonial Zambia was the 1928 Northern Rhodesia (Crown Lands and Native Reserves) Order in Council. This order is crucial to the understanding of contemporary land tenure in the country, as it introduced the dual system that, *mutatis mutandis*, is still in place today. The British administration aimed to encourage white settlements in the area and therefore guaranteed the availability of land to settlers, by confining natives within designated reserves that were set aside for their occupation. The Order classified land in two categories: native reserves and Crown lands, a residual category encompassing all the land not expressly reserved to natives. This dual classification was reflected in the dual legal regime that regulated land: Crown lands were held by non-natives under the common law of freehold and leasehold, whereas native reserves were managed according to local customary law. Natives were not allowed to get title over Crown lands, as it was believed that the customary land system did not allow for individual rights, but only for communal rights.¹⁶

The Order resulted in the forced displacement of natives to the designated reserves, as Crown lands could only be alienated to white settlers. Native reserves were demarcated in areas that were far from the capital Lusaka, from the mineral resources that were extracted at the time, and from the railway line that had just been built.¹⁷

¹⁵ Meek, *Land Law and Custom in the Colonies*, 120-30.

¹⁶ Mphanza P. Mvunga, *The Colonial Foundations of Zambia's Land Tenure System* (Lusaka: National Education Company of Zambia, 1980).

¹⁷ *Ibid.* An excellent analysis of the dualism that the colonial power introduced in Southern Africa and of the creation of the "bifurcated state" can be found in: Mahmood Mamdani, *Citizen and Subject*.

After the 1928 Order, it soon became clear that reserves could not suffice to the needs of natives and that simultaneously Crown land was in excess of the needs of settlers. Native reserves were overcrowded, due to the displacement of natives from Crown land, and large portions of them were not suitable for human settlement, due to the lack of water sources. Moreover, most of the Crown lands had not been alienated since the flow of settlers to Northern Rhodesia was smaller than expected. Also, some of the settlers were not able to find workforce for their farms, due to the displacement of the natives.¹⁸

The colonial administration addressed these issues firstly by designating new reserves through the Northern Rhodesia (Native Reserves) Supplementary Order in Council 1929, and then by introducing a new land policy in 1942. The new policy, which was implemented by the Northern Rhodesia (Native Trust Land) Order in Council in 1947, created a third category of land: native trust land. Similarly to native reserves, trust lands were regulated by African customary law and were to be used by natives, but could also be alienated for a maximum of 99-years to non-natives when this proved to be in the benefit of the community. As such, native trust land was meant to “provide fully for the agricultural requirements of the natives and... also allow ready access to existing and prospective railway lines and to all-weather roads.”¹⁹ Trust lands covered more than 50 percent of land in Zambia²⁰ and thus expanded significantly the size of land available under customary tenure. Crown land remained reserved for non-

Contemporary Africa and the Legacy of Late Colonialism (Princeton: Princeton University Press, 1996).

¹⁸ Meek, *Land Law and Custom in the Colonies*.

¹⁹ Northern Rhodesia Government Gazette, July 142, quoted in: Meek, *Land Law and Custom in the Colonies*, 122.

²⁰ Taylor Brown, "Contestation, Confusion and Corruption: Market-Based Land Reform in Zambia," in *Competing Jurisdictions: Settling Land Claims in Africa*, ed. Sandra Evers, Marja Spiereburg, and Harry Wels (Amsterdam: BRILL, 2005), 84.

native settlement and mining, and native reserves maintained their previous status and function.

In Zambia, like in the other colonies, the British rulers relied on the role of chiefs to control the territory through indirect rule and to enforce the codified version of customary law.²¹ As mentioned in Chapter 1, the impact of colonialism on customary law has been thoroughly discussed in the literature: according to some, it shaped the key principles of customary law and gave prominence to chiefs in land management.²² Moreover, some authors argue that the concept of inalienability of land under customary law was but a colonial creation, which enabled the colonizers to appropriate resources and controlling land transactions.²³ Regardless of what arrangements were in place before the arrival of the British South African Company, it is important to note that the role of chiefs as custodians of land on behalf of their communities in Zambia is, and has been, central to the land tenure system.

²¹ *Ibid.*

²² See Chapter 1, Section III.

²³ Kojo Sebastian Amanor, "The Changing Face of Customary Land Tenure," in *Contesting Land and Custom in Ghana. State, Chief and the Citizen*, ed. Janine Ubink and Kojo Sebastian Amanor (Leiden: Leiden University Press, 2008).

Between Change and Continuity: Land in Independent Zambia

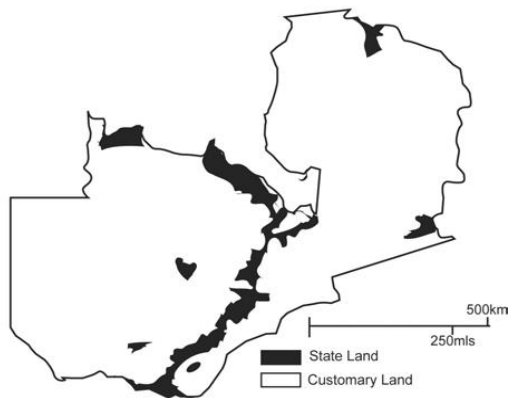
The dual land tenure system, which encompassed separate but coexisting statutory and customary rights, went almost unchanged through the decolonization process. At the time of independence, the architecture of the land tenure system was kept intact and the colonial orders remained in full force. However, some changes were necessary to adjust the legal system to the independence of the country and to divest the British Crown from its ownership of Zambian land. Therefore, in 1964 two orders vested all the Crown land, native reserves, and native trust land in the President of Zambia.²⁴

These orders did not modify the existing categories of land, but they simply renamed Crown land into state land. The independent government confirmed the duality in the regulation and administration of land, so that state land remained subject to statutory law, and specifically to common law, and reserves and native trust land to local customary law and under the custody of traditional authorities. At that time, 94 percent of land fell in the customary domain, since it was demarcated as reserve or trust land, and a mere six percent was state land.²⁵

²⁴ These changes were introduced by the Zambia (State and Native Reserves) Order 1964 and the Zambia (Trust Land) Order 1964. For a detailed analysis of the land reforms introduced after independence, see: Mudenda, *Land Law in Zambia*, 377-403.

²⁵ Jhon W. Bruce and Peter P. Dorner, "Agricultural Land Tenure in Zambia: Perspectives, Problems and Opportunities," in *Land Tenure Center Research Paper* (Madison, WI: Land Tenure Center, University of Wisconsin-Madison, 1983). For the ratio of customary and state land, see the figure below.

Fig. 1: Geographical Distribution of Customary and State Land in Zambia



Source: Brown, Taylor. "Contestation, Confusion and Corruption: Market-Based Land Reform in Zambia." In *Competing Jurisdictions: Settling Land Claims in Africa*, edited by Sandra Evers, Marja Spiereburg and Harry Wels. Amsterdam: BRILL, 2005, p. 83.

In 1965 the Government appointed a Commission to analyze colonial land policy and suggest the way forward with respect to land management in the country. The report issued by the Commission in 1967 suggested the unification of the land tenure system by means of a Land Administration Act and the formal registration of the titles held under customary law. These recommendations, however, were not implemented by the Government, which did not substantially modify the land system of the country.

It was a decade after, in 1975, that an important change in the land tenure system was introduced by the country's sole party. The United National Independence Party guided by Kenneth Kaunda nationalized land in the framework of its socialist economic policy. As a response to numerous instances of land speculation throughout the country, President Kaunda announced that all the existing freehold titles to land were to be

abolished and converted into 100-years leasehold titles.²⁶ Introduced through the Land (Conversion of Titles) Act, this change aimed simultaneously to undermine the marketability of land and strengthen its use value, in line with the idea that

land was never bought. It came to belong to individuals through usage and the passing of time... It is the most sacred and indeed the most highly priced of all natural resources in God's creation and it must therefore be made available to all in equal terms.²⁷

Accordingly, the Act reaffirmed that all the land of the country was vested in the President on behalf of Zambian citizens and abolished the sale of land.²⁸ It specified that compensation be paid for the improvements on the land, but not for the land in itself, since land had no commercial value.²⁹ The new act centralized all decisions over land in the President, as they required his approval for all land transactions.

The reform was supplemented with a provision contained in the 1985 amendment to the Act that restricted the transfer of land to foreigners.³⁰ This amendment resulted from a controversy concerning the large-scale acquisition of land by a foreign company, to whom the Government had granted more than 20 thousand hectares for agricultural purposes. The local people opposed this transaction, due to their forced displacement, and the public outcry that followed led the Parliament to pass the amendment, to ensure that "no land in Zambia shall... be granted, alienated, transferred or leased to a non-Zambian."³¹

²⁶ Martin Adams, "Land Tenure Policy and Practice in Zambia: Issues Relating to the Development of the Agricultural Sector," (Oxford: Mokoro Ltd., 2003).

²⁷ Kenneth Kaunda, quoted in Mudenda, *Land Law in Zambia*, 379.

²⁸ 1975 Land (Conversion of Titles) Act, Preamble and Section 4.

²⁹ *Ibid.*, Section 7.

³⁰ The reform was introduced by the 1985 Land (Conversion of Titles) Act (Amendment).

³¹ 1985 Land (Conversion of Titles) Act (Amendment), Section 13.

The Transition to Democracy and the 1995 Land Reform

Following the ban on land sales, and the affirmation of the principle of inalienability of all the land, land markets in Zambia ceased to operate. The absence of land markets was one of the key elements that the International Monetary Fund (IMF) and the World Bank (WB) later identified as a weakness in the country's planned economy.³² After poor economic performance in the 1970s, which was mostly due to the fluctuation of copper prices in the international market, the government was compelled to request financial support from the IMF and WB, which ultimately led to the country's first structural adjustment program in 1976.³³ Among the policy prescriptions that accompanied the loans was a land reform that aimed to liberalize land markets and reduce the control of the President over land transactions. In the late 1980s, the country entered a slow and peaceful transition to multiparty democracy; land reform was at the core of the political manifesto of the Movement for Multiparty Democracy (MMD) that won the 1991 elections.³⁴

It is in this context that the 1995 Lands Act, which remains in force today, was passed by Parliament with the objective of creating an open land market and at the same streamlining land administration. After a heated national debate,³⁵ the Act introduced several novelties in the land tenure system, simultaneously also reaffirming the dualism between statutory and customary tenure that originated during colonialism, by unifying trust and reserve lands in the new category of customary land, governed by customary

³² Brown, "Contestation, Confusion and Corruption: Market-Based Land Reform in Zambia".

³³ *Ibid.*

³⁴ Adams, "Land Tenure Policy and Practice in Zambia: Issues Relating to the Development of the Agricultural Sector".

³⁵ *Ibid.*

law. The Act repealed the previous legal basis for land administration in the country, and in particular the Land (Conversion of Titles) Act of 1975.

In order to fully understand the changes brought about by the Lands Act, it is crucial to understand the difference in the management of state land (or titled land) and customary land, i.e. native trust land and native reserves, before 1995. As envisioned first by the British and later by the independent government, state land was intended for private use and held under freehold and leasehold titles initially, and only leasehold titles after 1975. Before 1975, private titleholders could dispose of the land and alienate it freely. Governed by statutory law, state land was—and still is—mostly located in urban and peri-urban areas, as shown in the figure above. A title issued by the Commissioner of Lands, the delegate of the President for the management of land, certifies the rights of its holder. Furthermore, state land is subject to taxation from the State.

Customary land, which represents the bulk of land in the country, is in contrast governed by customary law and administered by traditional leaders at the local level.³⁶ All the land of the country, both state and customary, is vested in the President,³⁷ but the use of customary land is subject to rules that are generally not written and vary significantly across the 73 Zambian tribes. Each tribe reproduces norms that balance private and communal use rights in different ways, but a common feature lies in the important role of traditional leaders (called chiefs and headmen), who are in charge of the allocation of customary land throughout the country.³⁸ Although customary land is

³⁶ Mudenda, *Land Law in Zambia*, 759-82. The 1965 Chiefs Act regulates the power of traditional rulers and it provides that they perform their functions under customary law unless it conflicts with the Constitution or other laws (1965 Chiefs Act, Section 10(1)(a)).

³⁷ It is important to note that the President delegated his functions of land administration to the Commissioner of Lands, head of the Lands Department (Mudenda, *Land Law in Zambia*).

³⁸ As discussed in Chapter 2, the literature on African land law has highlighted the multi-faceted nature of customary tenure. Whereas most scholars have noted that customary tenure is inherently communal, others have emphasized that individual land rights may be granted under customary law

susceptible to private use, it was not possible to obtain title over it, since it fell exclusively under the jurisdiction of customary law and therefore outside the realm of state norms that regulate freehold and leasehold. Community members may access land freely, in as much as land is available, whereas strangers are required to obtain permission from the chief.³⁹

Because of their different characteristics, customary and state land could not be disposed of in the same way. Before 1975, state land could be alienated by the holder of the title; customary land, however, cannot be sold as it serves the needs of the community as a whole and, according to customary law, it is intended to support future generations as well.⁴⁰ Therefore, customary land is not a commodity that can be sold freely on the market, since it is regulated by laws that differ from those of demand and offer. As mentioned above, the majority of land in the country is classified as customary and therefore cannot be exchanged on the market, due to its characteristic and the norms that regulate it.

In line with the prescriptions of structural adjustment programs, the push to liberalize the economy required the creation of a free market for land. However, the nature and characteristics of customary land prevented its full-fledged marketability. For this reason, the 1995 Lands Act introduced new provisions concerning the

(for a comprehensive review, see: Pauline E. Peters, "Challenges in Land Tenure and Land Reform in Africa: Anthropological Contributions," *World Development* 37, no. 8 (2009)). The two positions are complementary, since customary law varies significantly across tribes and regions and the degree to which communal and individual rights coexist is context specific. Moreover, customary law is to be understood as a dynamic process which changes across time to address the changing needs of society (Lorenzo Cotula, "Changes in "Customary" Land Tenure Systems in Africa," (London: International Institute for Environment and Development, 2007)) and which is the product of power dynamics at the local level (Martin Chanock, "Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure," in *Law in Colonial Africa*, ed. Kristin Mann and Richard Roberts (Portsmouth, NH: Heinemann, 1991).

³⁹ Mudenda, *Land Law in Zambia*.

⁴⁰ This characteristic is explained very clearly in the famous quote of a Nigerian chief: "I conceive of land to as belonging to a vast family of whom many are dead, a few are living and countless are still unborn. People holding land are thus doing so in trust for ancestors and for those who are not yet born and also the community as a whole." (Charles L. Lane, *Custodians of the Commons: Pastoral Land Tenure in East and West Africa* (London: Earthscan, 1998), 1).

conversion of tenure⁴¹ that allow for the transformation of customary land into state or titled land, in order to *physically* expand the land market in the country. By following an administrative procedure, customary land users can apply for conversion of tenure and obtain a leasehold title from the Commissioner of Lands. In order to do so, customary landholders are required to obtain the consent of the chief and the approval of the District Council.⁴² The conversion of tenure is not only available to customary land users: according to the Lands Act, the President may alienate customary land to foreign investors, by first converting it into state land.⁴³

It is important to note the far-reaching implications of the 1995 provisions, which significantly modified the land tenure system of the country. By allowing the registration of titles on customary land, the Lands Act enabled the transformation of customary land into titled land and therefore its commercialization, which was not possible before. At the same time though, the Lands Act stated clearly that no consideration shall be paid for the conversion of title,⁴⁴ in an effort to avoid speculation over customary land. Although not expressly mentioned in the Act, the land conversion is permanent. After the issue of title, land cannot revert to the authority of the chief, but it remains subject to the control of the Commissioner of Lands.⁴⁵ Moreover, title holders carry the obligation to pay ground rent to the latter.⁴⁶

⁴¹ 1995 Lands Act, Section 8.

⁴² The procedure for the conversion of customary tenure into leasehold tenure is regulated by Section 8 of the 1995 Lands Act. Internal circulars of the Ministry of Lands provide further details on the conversion procedure. For more details, see the next Section of this Chapter.

⁴³ 1995 Lands Act, Section 3.

⁴⁴ 1995 Lands Act, Section 4.

⁴⁵ See Section 8 of the Lands Act and the Lands (Customary Tenure) (Conversion) Regulations, 1996.

⁴⁶ Mudenda, *Land Law in Zambia*. It is important to note that leasehold titles contain provisions for the “re-entry” of the President, i.e., provisions that guarantee the return of the land under full control of the President if one of the conditions of the lease is breached. A ground for re-entry is, for example, the lack of development of the land (*ibid.*)

Since 1964, data on the ratio between state and customary land has not been updated.⁴⁷ A land audit was announced in 2014,⁴⁸ but officially customary land still constitutes 94 percent of land in the country. However, beginning in the early 2000s, a few studies have documented the increased commercialization of customary land and the rapid pace of conversion into state land.⁴⁹ According to these studies, land conversions appears to have benefitted mostly local elites, who are better placed to ensure the smooth processing of the conversion and may thus obtain title more easily.⁵⁰ As estimates on the titles issued by the Ministry of Lands shows, the Lands Act has been successful in creating a land market.⁵¹ It is also because of this reform that foreign investors may now access large tracks of land for agricultural purposes by converting customary land into state land.⁵² The next Section discusses current trends of agricultural investments and outlines the mechanism through which foreign investors can access land in Zambia. This mechanism is strictly linked to the land conversions introduced in 1995.

⁴⁷ Horman Chitonge, "Customary Land in Zambia at Crossroads: Two Decades of Contested Land Policy and Reforms," paper presented at the *Workshop on the Interplay of Customary Law Rights in Land and Legal Pluralism* (Cape Town 2014), unpublished.

⁴⁸ Bruce Chooma to *Zambian Economist*: Information, Ideas and Influence 2014, <http://www.zambian-economist.com/2014/09/zambias-chaotic-land-administration.html>. Accessed 1 June 2015.

⁴⁹ See for example: Adams, "Land Tenure Policy and Practice in Zambia: Issues Relating to the Development of the Agricultural Sector"; Brown, "Contestation, Confusion and Corruption: Market-Based Land Reform in Zambia"; Chitonge, "Customary Land in Zambia at Crossroads: Two Decades of Contested Land Policy and Reforms".

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² Notwithstanding the numerous restrictions in place, foreign investors could still access land before the 1995 reform. The Lands Act streamlined the process and reduced the centralized controls on it, by enabling the conversion of customary land.

III. Large-scale Agricultural Investments in Zambia

The agricultural sector in Zambia accounts for approximately 20 percent of GDP and is highly labor intensive, employing more than 70 percent of the population.⁵³ Beginning in the late 1970s, the Government has introduced policies aimed at the development of this sector,⁵⁴ in order to diversify the economy and reduce reliance on the mining sector and copper price fluctuations. It is to be noted that Zambia is highly dependent on minerals and copper constitutes 70 percent of total export value from the country.⁵⁵

The liberalization of the economy and the dismantling of previous restrictions on foreign investments have been fostered by government agencies created in the Nineties in line with the structural adjustment policies: Zambia Investment Centre,⁵⁶ Zambia Privatisation Agency,⁵⁷ Export Board of Zambia,⁵⁸ Small Enterprise Development Board,⁵⁹ and Zambia Export Processing Zones Authority.⁶⁰ In 2006 these five statutory bodies were merged to streamline investment promotion through the creation of a “one stop facility” for investors,⁶¹ the Zambia Development Agency (ZDA).⁶² ZDA’s mission is to “further the economic development of Zambia by promoting efficiency, investment and competitiveness in business and promoting exports from Zambia.”⁶³ Foreign investors are required by law to register with the ZDA and to apply for an

⁵³ Agriculture, value added in Zambia (% of GDP), World Development Indicators 2015, <http://data.worldbank.org/indicator/NV.AGR.TOTL.ZS> (accessed 1 June 2015); employment in agriculture in Zambia (% of total employment), World Development Indicators 2015, <http://data.worldbank.org/indicator/SL.AGR.EMPL.ZS>. Accessed 1 June 2015.

⁵⁴ Samuel Jenkin, "Foreign Investment in Agriculture: A Medium-Term Perspective in Zambia," paper presented at the *Swedish Economic History Meeting* (Göteborg 2011), available at: <http://www.aegis-eu.org/archive/ecas4/ecas-4/panels/61-80/panel-71/Samuel-Jenkin-Full-paper.pdf>. Accessed 1 June 2015.

⁵⁵ World Bank, "How Can Zambia Benefit More from Mining?," news release, 2016.

⁵⁶ This agency was established by the 1993 Zambia Investment Act.

⁵⁷ This agency was established by the 1992 Zambia Privatisation Act.

⁵⁸ This agency was established by the 1994 Zambia Export Development Act.

⁵⁹ This agency was established by the 1996 Small Enterprise Development Act.

⁶⁰ This agency was established by the 2001 Export Processing Zones Act.

⁶¹ 2006 ZDA Act, Preamble.

⁶² 2006 Zambia Development Agency Act.

⁶³ 2006 ZDA Act, Section 5.1.

investment license.⁶⁴ Upon obtainment of the license, they may access the incentive schemes provided by the Government and listed in the 2006 ZDA Act.

The World Bank estimates that in Zambia only 30 percent of land suitable for cultivation is currently utilized and therefore the potential for agricultural development and yields is high.⁶⁵ These figures are contested in the literature,⁶⁶ as they do not take into account some land uses that provide livelihood to rural populations—such as shifting cultivation, nomadic cattle herding, and collection of common pool resources from forests. However, the Government of Zambia set in place policies that aim to expand the percentage of land under cultivation and foster agricultural production.

Investors are provided with incentives in the agricultural sector. The ZDA Act identified horticulture, floriculture, cotton production, and timber production and processing as “priority sectors”⁶⁷ so that, by means of example, an investment of more than \$500,000 (USD) in these sectors entitles the company to:

zero percent tax rate on dividends for 5 years [...], zero percent tax on profits for 5 years [...], zero percent import duty rate on raw materials, capital goods, machinery including trucks and specialized motor vehicles for five years, deferment of VAT on machinery and equipment including trucks and specialized motor vehicles.⁶⁸

Alongside these fiscal incentives, in 2005 the Government of Zambia introduced the Farm Block Development Plan, which aims to create large commercial farm blocks in which infrastructure such as electricity, irrigation, and transport are provided by the Government.⁶⁹ With this policy, the Government aims to attract investment in large-scale and mechanized agriculture by creating nine farm blocks, one in each Province, in

⁶⁴ 2006 ZDA Act, Section 59.

⁶⁵ Klaus Deininger and Derek Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?* (Washington, DC: World Bank, 2011).

⁶⁶ See for example: Laura German, Davison Gumbo, and George Schoneveld, "Large-Scale Land Investments in *Chitemene* Farmland: Exploring the Marginal Lands Narrative in Zambia's Northern Province," *QA - Rivista dell'Associazione Rossi-Doria* 2 (2013).

⁶⁷ 2006 ZDA Act, Schedule II.

⁶⁸ ZDA, "Zambia's Investor Guide Handbook," 8.

⁶⁹ Ministry of Finance and National Planning, "Farm Block Development Plan 2005-2007," (Lusaka 2005).

which investors can readily access land suitable for agriculture and use the related infrastructure. This plan is strictly intertwined with land tenure patterns in the country: through it, the Government intends to secure customary land from chiefs by converting it into state land by means of titles and making it readily to investors. However, some traditional rulers have been reluctant to release land for this purpose so that the land titling has taken longer than expected.⁷⁰ Moreover, the implementation of the plan is constrained by a chronic lack of funds, so that to date only a minority of the farm blocks envisioned in the policy are operational.⁷¹ In addition to this, ZDA holds a Land Bank which includes titled land that can be transferred to investors, although as Nolte noted, it “seems to play a negligible role in allocating land to investors.”⁷²

Notwithstanding the delays in the creation of farm blocks and the scarce impact of the Land Bank, the general trend of foreign investment in agriculture shows an unprecedented growth over the past 10 years, as the next paragraph will discuss.

Current Trends

Understanding the actual size of large-scale agricultural investments in Zambia is not an easy task. At the national level, there is no published statistics on land leased to foreign investors; the only information available concerns the investment certificates issued by the ZDA to the foreign companies registered to operate in the country.

⁷⁰ Chu, "Creating a Zambian Breadbasket - 'Land Grabs' and Foreign Investments in Agriculture in Mkushi District".

⁷¹ On farm blocks development, see also: Honig, "State Land Transfers and Local Authorities in Zambia".

⁷² Nolte, "Large-Scale Agricultural Investments under Poor Land Governance in Zambia," 700. This has been confirmed in the field research by ZDA, whose officer lamented the lack of staff and resources for the implementation of the land bank (ZDA, Land Expert, interview no. 3, Lusaka, 30 January 2015).

In order to grasp the recent trends of agricultural investments in the country, data on investment certificates for the years 2004-2014 was acquired from the ZDA.⁷³ For each license issued by the ZDA, the data obtained consists of information on company name, country of origin, value of the pledged investment in USD, and expected employment creation. The lack of information on the implementation of pledged investments constitutes a major limitation of the dataset: the ZDA does not conduct a thorough monitoring of the investment projects, and at the national level there is no statistics on the implementation of agricultural investments. Moreover, the international database on sectorial Foreign Direct Investment (FDI) does not provide data on agricultural FDI in Zambia,⁷⁴ so that it is not possible to determine the extent to which pledged investments have been implemented.

Nonetheless, the data obtained from the ZDA illustrates the trends in the interest of foreign investors in the agricultural sector in Zambia and show a sharp increase in the value of pledged investment in agriculture over the past ten years. Moreover, it provides an interesting picture of the geographical origin of pledged investments, since it shows a clear prevalence in South-South relations.⁷⁵

As the figure below illustrates, the value of pledged investments has increased tremendously by going from \$24,373,000 (USD) in 2004 to the peak of \$597,707,705 (USD) reached in 2013.⁷⁶

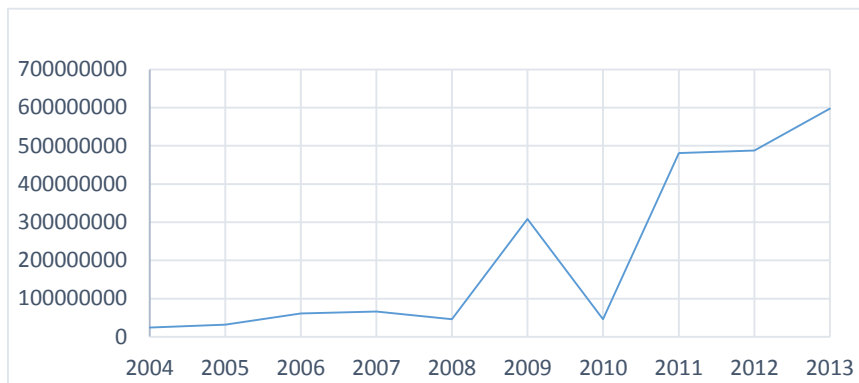
⁷³ Pledged agricultural investments, 2004-2015, Zambia Development Agency (unpublished data obtained in Lusaka on 25 January 2015).

⁷⁴ FDI by sector, UNCTAD 2015, www.unctadstat.unctad.org (accessed 1 June 2015). The limitations of the ZDA dataset on pledged investment in agriculture are extensively discussed in: Jenkin, "Foreign Investment in Agriculture: A Medium-Term Perspective in Zambia".

⁷⁵ It is important to note that agricultural investments do not necessarily entail the acquisition of land by the investor, since the investment may be operated thorough joint ventures with a local partner, or through contract farming arrangements.

⁷⁶ A thorough analysis of the data on pledged agricultural investments in Zambia and their determinants is beyond the scope of this Chapter and can be found in: Jenkin, "Foreign Investment in Agriculture: A Medium-Term Perspective in Zambia".

Fig 2: Pledged Investments in Agriculture in USD, 2004-2013



Source: Author's calculations based on ZDA data

With regards to the country of origin, the main investors are South African, British, and Indian. An important role is also played by American and Zimbabwean investors, whereas China, although its role in African agriculture has been extensively discussed in the literature,⁷⁷ ranks only sixth in the value of pledged investments. Table 1 shows the amount of pledged investments over the past 10 years classified according to the investor's country of origin.⁷⁸

It is also interesting to note that according to the data published in the Land Matrix, South Africa is the country from which the majority of investments originate.⁷⁹ However, based on the data and information collected on site, the Land Matrix figures appear to underestimate the size of land investments throughout the country, since they did not yet include two of the large-scale land acquisitions in Mumbwa and Serenje districts that are part of this study.⁸⁰

⁷⁷ For an empirical analysis, see: Jessica Chu and Solange Guo Chatelard, "Chinese Agricultural Engagement in Zambia: A Grassroot Analysis," in *Policy Brief* (Baltimore: Johns Hopkins University's School of Advanced International Studies, 2015).

⁷⁸ Due to space constraints, the table shows only the top ten countries in terms of pledged investments value. The ZDA dataset includes more than 44 countries of origin.

⁷⁹ The Land Matrix Global Observatory, Get the Detail by Target Country, Zambia, <http://landmatrix.org/en/get-the-detail/by-target-country/zambia/>. Accessed 1 June 2015.

⁸⁰ In particular, in 2013 and 2014 an Indian company in Mumbwa and a South African one in Serenje have acquired approximately 10,000 hectares each, and these transactions have not yet been included in the Land Matrix database. These processes of land acquisition are not complete, since in both cases title deeds from the Commissioner of Lands have not been issued yet.

Table 1: Pledged Investments in Agriculture by Country of Origin, 2004-2014

Country of Origin	Total Pledged Investments in USD (2004-2014)
South Africa	532,098,296
United Kingdom	381,754,971
India	207,554,569
United States	187,859,295
Zimbabwe	125,780,719
Malawi	112,659,500
China	90,700,423
Singapore	77,075,000
Kenya	52,960,000
Mauritius	52,670,333

Source: Author's calculation based on ZDA data

The overall lack of data over the size of land effectively acquired by foreign investors reverberates on the lack of up-to-date figures on the ratio of customary and state land, since many agricultural investments take place on customary land and determine its conversion into titled land. As such, the land audit announced by the Government could illuminate this process and provide reliable data on land tenure in the country.

The Acquisition of Land for Agricultural Purposes

As shown above, the past ten years have seen a substantial increase in the foreign acquisition of land for agricultural purposes. The majority of land in the country falls in the customary domain and as such cannot be freely exchanged in the market: according to both statutory and customary norms, customary land cannot be in itself acquired by

foreign investors,⁸¹ and this determines the pattern in which investments unfold in the country. As emerged from the analysis of the legislation⁸² and the interviews with key informants,⁸³ foreign investors may obtain leasehold titles over land by following three possible procedures.

First, foreign companies may acquire land through private transactions with leaseholders. In this case, the investment takes place on state land over which a title already exists. In such cases, the procedure is mostly regulated by statutory norms and particularly by the Lands and Deeds Registry Act,⁸⁴ which prescribes the registration of document and regulates the issue of certificates of title. In these cases, the transfer is fully a market-transaction at the conclusion of which the Commissioner of Lands issues a title to the investor.⁸⁵ During the field research, one large-scale land acquisition that had followed this procedure was identified in the Mumbwa district, where a German company secured more than 30,000 hectares on state land thorough private transactions with the previous leaseholders.

Second, investors may approach ZDA and request assistance in the identification of a suitable area that has already been demarcated as state land, and titled, and has been set aside for investments. The abovementioned policy on farm blocks aimed to make land readily available to investors by issuing a title over it and then allocating it after a bidding process. However, the implementation of farm blocks is still incomplete, so that

⁸¹ Mudenda, *Land Law in Zambia*.

⁸² 1995 Lands Act.

⁸³ ZDA, Land Expert, interview no. 3, Lusaka, 30 January 2015 and interview no. 25, Lusaka, 26 February 2015; Ministry of Agriculture and Livestock, Policy and Planning Department, Chief Economist, interview no. 2, Lusaka, 27 January 2015; Ministry of Lands, Natural Resources and Environmental Protection, Commissioner of Lands, interview no. 5, Lusaka, 6 February 2015; Ministry of Agriculture and Livestock, Department of Agriculture, Principal Agricultural Specialist, interview no. 6, Lusaka, 2 February 2015.

⁸⁴ The Lands and Deeds Registry Ordinance, 1914 was transformed into an Act when the country became independent in 1964.

⁸⁵ For a detailed discussion of the norms on land alienation, see: Mudenda, *Land Law in Zambia*, 783-838.

this possibility remains marginal; during the field research, no case of large-scale land acquisition that followed this procedure was identified.⁸⁶

As noted in the literature⁸⁷ and emerged in the interviews,⁸⁸ existing state land “is almost exhausted, so the land for investments has inevitably to come from customary land.”⁸⁹ Especially for greenfield investments, which develop land not formerly used for commercial agriculture, customary land is central, as it constitutes the majority of land in the country. This pattern has been confirmed during the field research, since two of the large-scale land investments analyzed are located on customary land, which is currently being converted into state land.⁹⁰ The “next frontier”⁹¹ for land investments is therefore customary land, which investors can access by following a hybrid procedure based on the interplay of customary and statutory law.

As emerged from interviews, the majority of investors interested in the acquisition of large tracks of land start their search at the ZDA.⁹² Although ZDA is not in charge of securing land to investors, it holds a land bank and its experts can provide a land search service and facilitate the process of identification of land and the issue of title over it.⁹³ Through site visits in rural areas, the ZDA land experts identify suitable

⁸⁶ German and others provide additional information on the initiatives of the Government to provide title over customary land and make it available to investors in: Laura German, George Schoneveld, and Esther Mwangi, “Contemporary Processes of Large-Scale Land Acquisition by Investors: Case Studies from Sub-Saharan Africa,” in *Occasional Papers* (Bogor, Indonesia: Center for International Forestry Research 2011).

⁸⁷ Nolte, “Large-Scale Agricultural Investments under Poor Land Governance in Zambia”.

⁸⁸ ZDA, Land Expert, interview no. 3, Lusaka, 30 January 2015 and interview no. 25, Lusaka, 26 February 2015; Ministry of Lands, Natural Resources and Environmental Protection, Commissioner of Lands, interview no. 5, Lusaka, 6 February 2015; Attorney and Land Law Practitioner, interview no. 9, Lusaka, 4 February 2015; Land Law Lecturer, interview no. 26, Lusaka, 27 February 2015.

⁸⁹ Ministry of Lands, Natural Resources and Environmental Protection, Commissioner of Lands, interview no. 5, Lusaka, 6 February 2015.

⁹⁰ The South African investment analyzed in Serenje (Company A) and the Indian one studied in Mumbwa (Company C) are both located on customary land that, by following the procedure illustrated in this Section, is being converted into state land.

⁹¹ Attorney and Land Law Practitioner, interview no. 9, Lusaka, 4 February 2015.

⁹² Civil Society Organization, Social and Economic Justice Officer, interview no. 1, Lusaka, 26 January 2015; ZDA, Land Expert, interview no. 3, Lusaka, 30 January 2015; Company A, Director, interview no. 13, Serenje, 11 February 2015; Company C, Officers, interview no. 22, Lusaka, 22 February 2015.

⁹³ 2006 ZDA Act, Section 64.

tracks of land that are in line with the requests of the investor; in most cases, ZDA identifies suitable customary land that can be converted into state land and makes the first contacts with the local chiefs.⁹⁴ If the investor is satisfied with the land proposed for the project, ZDA facilitates the process of conversion, which entails meetings and negotiations at the local level with traditional rulers, District authorities, and local communities. Investors may also identify the land without the help of ZDA, but given the complexity of the land system in the country, many investors rely on it.⁹⁵

As the Lands Act states, the chief in whose chiefdom the land is located has to approve the land conversion, i.e., the issue of a title on it.⁹⁶ To prove his agreement, the chief writes a letter of consent addressed to the District Council, in which he specifies the size and location of the land suggested for conversion.⁹⁷ In the letter, the chief declares that the land proposed for conversion is not used nor occupied and that the members of the community have been consulted on the proposed conversion.⁹⁸ As the next Section elaborates, this provision is especially problematic in the practice of large-scale land investments: many interviewees and focus group participants noted that consultation is sought by the chief and the investor only after the letter of consent has been submitted to the District Council, or not sought at all.⁹⁹

⁹⁴ ZDA, Land Expert, interview no. 3, Lusaka, 30 January 2015 and interview no. 25, Lusaka, 26 February 2015.

⁹⁵ As noted by ZDA Land Expert, “some companies come here, get their investment license, buy their titled land, and off they go! If the investor does not need the ZDA and feels they can do it on their own, they are free to do that. That happens only very few times, but most of them have come back crying, since some things have broken down on the way” (interview no. 3, Lusaka, 30 January 2015).

⁹⁶ 1995 Lands Act, Section 8.

⁹⁷ The procedure of land conversion is regulated by the Lands (Customary Tenure) (Conversion) Regulations, Statutory Instrument no. 89 of 1996 and by the Administrative Circular no. 1 of 1985.

⁹⁸ Lands (Customary Tenure) (Conversion) Regulations, Form II.

⁹⁹ Civil Society Organization, Social and Economic Justice Officer, interview no. 1, Lusaka, 26 January 2015; Ministry of Agriculture and Livestock, District Senior Agricultural Officer, interview no. 12, Serenje, 11 February 2015; Ministry of Chiefs and Traditional Affairs, District Officer, interview no. 16, Mumbwa, 18 February 2015; Community Members, focus group discussion no. 1, Mpande, 13 February 2015; Community members, focus group discussion no. 2, Moono, 20 February 2015. Contra: ZDA, Land Expert, interview no. 3, Lusaka, 30 January 2015; Zambia Environmental Management Agency, Senior Inspector, interview no. 8, 5 February 2015.

Once the consent of the chief has been obtained, the District Council's Committee responsible for land and planning discusses the proposed investment.¹⁰⁰ In this phase, the investor may be interviewed by the Committee and requested to produce documents concerning the proposed investment. The Committee may also organize visits to the site of the proposed conversion, for which the investor has to bear the costs.¹⁰¹ After the consent of this Committee, the full Council deliberates on the land conversion: in case of approval, it certifies that the alienation of land is not contrary to the customary law of the area¹⁰² and recommends the conversion to the Commissioner of Lands, who is ultimately responsible for the issuance of title. Investors are usually issued a Provisional Certificate of title for six years, after which a long-term leasehold title is issued.¹⁰³ This allows for more control against speculative investments and ensures that after the initial period an assessment of the land development is made.

It is important to note that, based on a 1985 Administrative Circular, District Councils and chiefs are advised "not to recommend alienation of land on title... in excess of 250... hectares as such recommendations would be difficult to consider."¹⁰⁴ Moreover, all the conversions in excess of 1,000 hectares are subject to the approval of the President of Zambia, and not of the Commissioner of Lands.¹⁰⁵

As is clear from the synthesis provided above, the conversion of customary land entails a variety of procedural steps at the local and national level. Evidence from the field—corroborated by literature on large-scale land investments—is discussed in the

¹⁰⁰ Administrative Circular no. 1 of 1985, Section D.

¹⁰¹ District Council, Planning Officer, interview no. 18, Mumbwa, 19 February 2015; District Council, Physical Planning Officer, interview no. 19, Mumbwa, 19 February 2015; Company C, Officers, interview no. 22 Lusaka, 22 February 2015.

¹⁰² Lands (Customary Tenure) (Conversion) Regulations, 1996, Section 3.

¹⁰³ Laura German, George Schoneveld, and Esther Mwangi, "Contemporary Processes of Large-Scale Land Acquisition by Investors: Case Studies from Sub-Saharan Africa."

¹⁰⁴ Administrative Circular no. 1 of 1985, Section D (V).

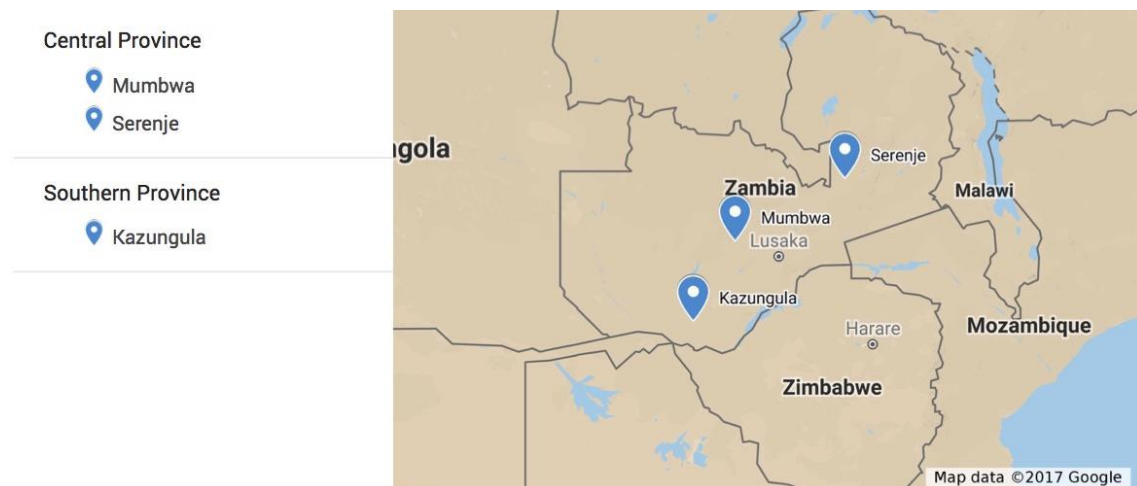
¹⁰⁵ In the interviews it was noted that this provision is easily circumvented by dividing the total area in different "phases" of conversion not exceeding 990 hectares (Company A, Director, interview no. 13, Serenje, 11 February 2015; Chief A, interview no. 14, Chibale, 12 February 2015).

next Section to highlight the problems that emerge in the conversion process. Specific attention is paid to the actors that benefit from the large-scale land investments on customary land.

The Districts Analyzed

Thanks to the input of ZDA and other informants in Lusaka, three rural districts were selected for field visits in order to analyze the ongoing agricultural investments in the area. As mentioned in Section I, the districts visited are Serenje, Mumbwa, and Kazungula, shown in the illustration below.

Fig. 3: Districts Analyzed in the Research



Source: Author's elaboration based on Google data

In the district of Serenje, located in the Central Province, a South African company requested access to 10 thousand hectares of land for the purpose of dairy farming. In 2012 the company registered with ZDA and requested support in its land search. Initially oriented towards the nearby district of Mkushi, the company encountered problems in the negotiations with the chief so that after 18 months it was re-directed by ZDA to Serenje. After the agreement of the chief and the district

authority, the company started operations in 2014. At the time of the visit in 2015, the land title had not been issued yet.

Fig. 4: The area surrounding the investment location in Serenje



Source: Author's picture

In the district of Mumbwa, also located in the Central Province, two large-scale land acquisitions have been identified and analyzed. The first of these was started by a German company, regularly registered at ZDA, which acquired about 30 thousand hectares for maize, soy, wheat, and barley production for export purposes.¹⁰⁶ Following the initial contacts with the ZDA and the District authorities in 2011, this company opted for land already titled. The area was demarcated as state land in the 1940s and then devoted to commercial farming. By employing members of the local community, the company engaged in negotiations with more than 20 leaseholders and aimed to acquire title over the whole area. At the time of the interview the company had already

¹⁰⁶ The company has its headquarters and operations in Kaindu, approximately 40 kilometers away from the District capital of Mumbwa.

obtained title on about 2 thousand hectares, and the process for the registration of the remaining 28 thousand was ongoing.¹⁰⁷

The second company active in the district was Indian and it had registered with ZDA in 2013 for maize production. Through the support of ZDA, the company negotiated access to about 10 thousand hectares with the chief and started its operations by progressively clearing land. In 2015, the company had not yet obtained title to the land in the area.

In the district of Kazungula no operational large-scale investment was identified. A large-scale agricultural project was in the process of approval at the local level and it entailed the cultivation of about 15 thousand hectares for sugar cane production, and the creation of a processing plant for sugar. However, the negotiations with local chiefs and landholders were delayed, so that at the time of the field visit no agreement with the chiefs had been reached yet. The area of interest to the investment included both titled land as well as customary land.

Negotiating Access to Land

The investments analyzed in the Mumbwa and Serenje districts were facilitated by ZDA. The Agency helped investors identify land and provided assistance in the contacts with both District authorities and chiefs. The involvement of ZDA was confirmed by all the informants; as company officials explained, the role of ZDA was crucial to the extent that in the meetings with the chief “ZDA just talks on our behalf.”¹⁰⁸ Companies saw the presence of ZDA in the negotiations as a safety net; for them, ZDA officials

¹⁰⁷ Company B, Officers, interview no. 20, Mumbwa, 19 February 2015. For further information on this investment, see the recent paper presented at the World Bank Conference on Land and Poverty: Dimuna Phiri, Jessica Chu, and Kathleen Yung, "Large-Scale Land Acquisitions and Development-Induced Displacement in Zambia: Lessons from Civil Society," paper presented at the 2015 *World Bank Conference on Land and Poverty* (Washington DC 2015).

¹⁰⁸ Company C, Officer 1, interview no. 22, Lusaka, 22 February 2015.

guaranteed the support of state institutions when negotiating with chiefs and provided reassurance that the District Council and the Commissioner of Lands would approve the land conversion. As highlighted in the interviews, the approval of the District Council is generally automatic and does not involve a thorough screening of the investment, as the authority of the chief to decide on land is respected by the Council.¹⁰⁹

As anticipated in the previous Section, the Lands Act warns that “no consideration shall be paid for [land] conversion”¹¹⁰ and thus excludes the possibility of customary land *sales*. This provision addresses the idiosyncratic nature of customary land, which is meant to ensure livelihood to present and future generations.¹¹¹ However, the Lands Act does not provide specific sanctions for the violation of this rule, nor does it foresee any mechanism to ensure its enforcement. In 2013 and 2014, rumors of illegal sales of customary land by chiefs gained attention in the country. Some reports argued that chiefs were giving away customary land in exchange for money, and were as such violating the law.¹¹² As mentioned in Section I, the problem was addressed by the Government in several political statements that firmly reiterated the ban on sales of customary land and the role of chiefs as mere custodians, and not owners, of the land.¹¹³

¹⁰⁹ Zambia Development Agency, Land Expert, interview no. 3, Lusaka, 30 January 2015; District Council, Officer, interview n. 11, Serenje, 10 February 2015.

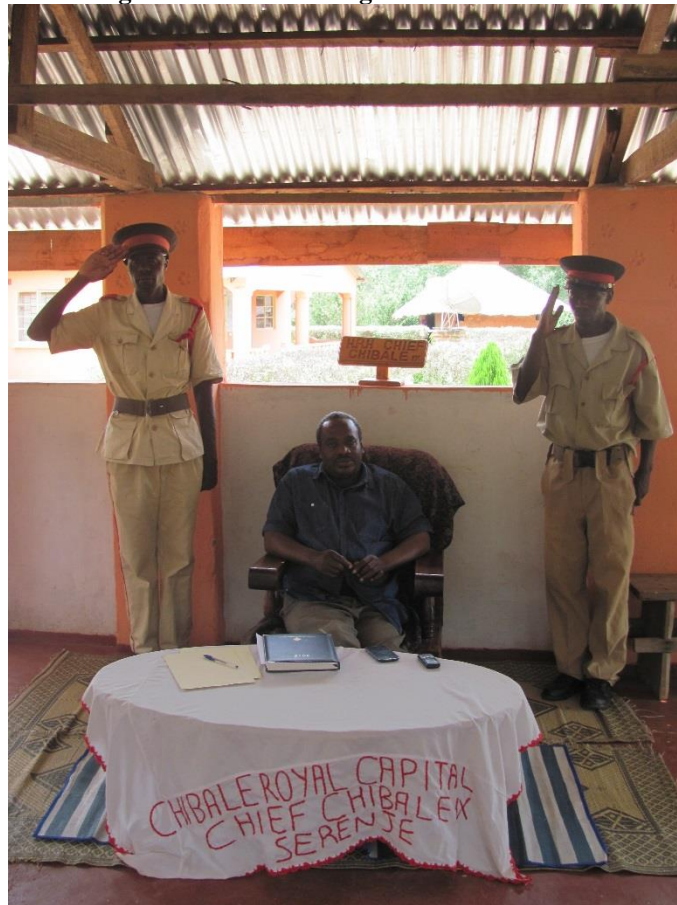
¹¹⁰ 1995 Lands Act, Section 4.

¹¹¹ As mentioned above, the inalienability of land is contested by some authors who argue that it is a product of colonialism (see for example: Martin Chanock, "Paradigms, Policies and Property: A Review of the Customary Law of Land Tenure," in *Law in Colonial Africa*, ed. Kristin Mann and Richard Roberts (Porstmouth, NH: Heinemann, 1991). Notwithstanding the complexity of the creation of customary law, this Chapter considers the rule of inalienability of customary land as a given – in that it has been confirmed through an analysis of the literature and the legislation and in the interviews and focus groups discussions.

¹¹² "Govt. Committed to Fighting Illegal Land Allocation," *Lusaka Voice*, 27 February 2013.

¹¹³ See for example: Davies M. M. Chanda, "Reclaim Illegally Obtained Land," *Times of Zambia*, 9 October 2014; "Government Bans the Sale of Customary Land with Immediate Effect," *Lusaka Times*, 10 December 2014.

Fig. 5: A Zambian village chief with his staff



Source: Author's picture

In the practice of land investments, this ban conflicts with the customary law that regulates the relations between a chief and his visitors. According to customary norms, every visitor is expected to pay homage to the chief, in order to show respect for his authority.¹¹⁴ In the three districts studied, the homage normally consisted of groceries such as rice, sugar, and salt together with soap and laundry detergent.¹¹⁵ The

¹¹⁴ The ascertainment of customary law is an extremely difficult and controversial task. As many authors emphasized, customary law changes over time, and its development is influenced by power dynamics at the local level (see Chapter 1). Moreover, the influence of the observer inevitably alters the norms that are scrutinized. This Chapter does not aim to analyze the specific details of customary norms, since their content is fluid, context specific, and difficult to ascertain, but rather to provide an overview of the general content of customary norms that are relevant to large-scale land acquisitions and regulate the relations between the chief and his subjects and visitors.

¹¹⁵ Civil Society Organization, Social and Economic Justice Officer, interview no. 1, Lusaka, 26 January 2015; ZDA, Land Expert, interview no. 3, Lusaka, 30 January 2015; Chief B, interview no. 21, Mumbwa, 20 February 2015; Community Members, focus group discussion no. 1, Mpande, 13 February 2015.

presence of this customary rule creates a window of opportunity for chiefs and is often used by them to justify the benefit they derive from the conversion of customary land. As emerged in the interviews¹¹⁶ and noted in the literature,¹¹⁷ chiefs generally consent to the conversion of land for investors in exchange for the payment of a “token.”¹¹⁸ Investors, often accompanied by District or ZDA officers,¹¹⁹ approach the chief to request land in his chiefdom and engage in private negotiations over the nature and amount of the token, which many interviewees describe as a “courtesy” to the chief for releasing land to the investor.¹²⁰ It is important to note that the mediation of District and ZDA officers helps foreign investors navigate the Zambian customary system: in the interviews, company representatives describe the role of ZDA in the negotiation with the chiefs as crucial. Zambian officers are able to explain customary rules and practices to investors and help them negotiate with the chief on the amount to be paid as a token.

In the districts visited, the chiefs consented to the conversion of land in exchange for a lump-sum payment. In the literature, cases have been reported in which other benefits were provided to chiefs, such as such vehicles or “palaces.”¹²¹ Although consideration for the conversion of customary land is forbidden, evidence shows that

¹¹⁶ The payment of the “token” has been widely acknowledged by all the interviewees, including companies, chiefs, government officers, and civil society organizations.

¹¹⁷ See for example: Laura German et al., “Shifting Rights, Property and Authority in the Forest Frontier: ‘Stakes’ for Local Land Users and Citizens,” *The Journal of Peasant Studies* 41, no. 1 (2014); Honig, “State Land Transfers and Local Authorities in Zambia”; Nolte, “Large-Scale Agricultural Investments under Poor Land Governance in Zambia”.

¹¹⁸ ZDA, Land Expert, interview no. 3, Lusaka, 30 January 2015.

¹¹⁹ This aspect was noted by many interviewees such as company representatives, chiefs, district authorities, and ZDA officers (ZDA, Land Expert, interview no. 3, Lusaka, 30 January 2015; Ministry of Agriculture and Livestock, District Senior Agricultural Officer, interview no. 12, Serenje, 11 February 2015; Chief A, interview no. 14, Chibale, 12 February 2015; Company C, Officers, interview no. 22, Lusaka, 22 February 2015).

¹²⁰ This explanation was put forward, for example, in the following interviews and focus groups: ZDA, Land Expert, interview no. 3; Ministry of Traditional Affairs and Chieftaincy, Officer, interview no. 4, Lusaka, 4 February 2015; Company A, Director, interview no. 13, Serenje, 11 February 2015; Community Members, focus group discussion 1.

¹²¹ Nolte, “Large-Scale Agricultural Investments under Poor Land Governance in Zambia.” This was also noted by some interviewees (Civil Society Organization, Social and Economic Justice Officer, interview no. 1, Lusaka, 26 January 2015; Ministry of Agriculture and Livestock, District Senior Agricultural Officer, interview no. 12, Serenje, 11 February 2015).

chiefs strategically consider the token as part of their prerogatives under customary law, and not as an illegal practice.¹²² The amount transferred to chiefs in exchange for land has not been disclosed by any of the interviewees and has not been documented in previous studies. However, interviewees noted that the token varies depending on the size of land to be transferred to the investor, not dissimilar to the price of goods being exchanged in a regular market transaction.¹²³ As a District official clarified, “someone is giving you something for free, so you have to give him back something reasonable.”¹²⁴

Some of the interviewees further observed that transactions between chiefs and investors are generally sanctioned by a written agreement, which is signed by both parties at the end of the negotiations over land. Both chiefs and company officers mention the existence of written agreements that bind the parties to respect the conditions stipulated in the negotiations regarding the size of the land, purpose of the investment, and payment for release of the land.¹²⁵ It is important to note that the negotiations between chiefs and investors are based on a significant asymmetry. Investors have a good understanding of the commercial value of land and may obtain land at a nominal price. Furthermore, chiefs lack legal education and as such it is difficult for them to secure an agreement that binds the investor to maximize the benefits for the chiefs and their communities.¹²⁶

¹²² Chief A, interview no. 14, Chibale, 12 February 2015; Chief B, interview no. 21, Mumbwa, 20 February 2015; Community Members, focus group discussion 2, Moono, 20 February 2015.

¹²³ Chief A, interview 14; Company C, Officers, interview no. 22, Lusaka, 22 February 2015. For Ghana, the field research shows that local chiefs receive approximately \$100 (USD) per hectare of land released to the investor. Figures in Zambia are expected to be lower.

¹²⁴ District Council, Planning Officer, interview no. 18, Mumbwa, 19 February 2015.

¹²⁵ Company A Director, interview no. 13, Serenje, 11 February 2015; Chief A, interview no. 14, Chibale, 12 February 2015; Chief B, interview no. 21, Mumbwa, 20 February 2015; Company C officers, interview no. 22, Lusaka, 22 February 2015. The existence of contracts between investors and chiefs has also been confirmed by the ZDA Land Expert (interview no. 3). Access to these documents has been denied by all the interviewees, based on their confidentiality.

¹²⁶ Civil Society Organization, Social and Economic Justice Officer, interview no. 1, Lusaka, 26 January 2015.

In the meetings between chiefs and investors for the conversion of customary land, two opposing *legalities* are confronted: the state one, expressed by the ban on customary land sales, and the customary one, which requires visitors to pay homage to the chief. In this confrontation, chiefs successfully secure profits for themselves and receive the payment of a token, by strategically referring to customary law as the justification for their demands and by interpreting their prerogatives in an extensive way. As such, chiefs benefit from their position as custodians of land on behalf of their communities: by alienating land from the customary domain, they transfer to investors a commodity that is, on the contrary and according to both customary and state law, not marketable for local communities.

In these transactions, investors secure access to land for a seemingly nominal price: as emerged in the interviews, customary land is considerably less expensive than state land on which title deeds already exist.¹²⁷ As an investor states in the interview, “we chose customary land because it is cheaper. Part of the reason we opted for this type of land is that we were able to create a lot of added value to that land.”¹²⁸ Alongside the payments to the chiefs, which according to statutory law should not be made, investors are required to pay the processing fees for the land conversion and the issuance of title. After the issue of title, which generally takes more than one year,¹²⁹ the land is subject to the payment of ground rent. Even when accounting for the processing fees, the token, and rent, investing in customary land remains considerably cheaper than in state land and the competitiveness of customary land appears to come at the expenses of local communities, who see land permanently alienated from the customary domain.

¹²⁷ Company C, Officers, interview no. 22, Lusaka, 22 February 2015; ZDA, Land Expert, interview no. 25, Lusaka, 26 February 2015.

¹²⁸ Company A, Director, interview no. 13, Serenje, 11 February 2015.

¹²⁹ ZDA, Land Expert, interview no. 3; Ministry of Lands, Natural Resources and Environmental Protection, Commissioner of Lands, interview no. 5; Company A, Director, interview no. 13, Serenje, 11 February 2015; District Council, Planning Officer, interview no. 18, Mumbwa, 19 February 2015.

As mentioned in the previous Section, the conversion of customary land is the main path through which foreign investors access land in Zambia. The alienation of land by chiefs in exchange for a token can be read as an instance of partial and informal commodification of customary land, which is further confirmed by the signing of written agreements between chiefs and investors. In practice, chiefs sell customary land to investors, but according to the chiefs, investors are merely paying a traditional homage. This mismatch seem to exclude local communities from the benefits of these monetary transactions, from which, on the contrary, chiefs and investors stand to benefit in different ways.

Community Consultation and Land Conversions

As discussed above, the chief is responsible for issuing the letter of consent that initiates the procedure of land conversion. In the letter, the chief has to declare that he is “not aware of any other right(s), personal or communal, to the use and occupation of the land or any other part of the land” and that he “has caused the consultation to be made with members of the community.”¹³⁰ The statutory provisions on conversions do not specify the necessary procedure to be followed for the consultation, nor the way in which previous rights to land are to be ascertained.

Moreover, it is important to note that the Environmental Protection Regulations require investors to undertake an environmental impact assessment for when land is cleared for large-scale agriculture.¹³¹ In its framework, it is mandatory to “organise a public consultation process, involving Government agencies, local authorities, nongovernmental and community-based organizations and interested and affected

¹³⁰ Lands (Customary Tenure) (Conversion) Regulations, Form II.

¹³¹ The Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations, 1997, First Schedule.

parties.”¹³² The Regulations specify that the content of the project has to be publicized in a local language and that after the publication meetings have to be held with the affected communities.¹³³

In contrast with the provisions of statutory law, the role of chiefs in the allocation of land under customary law does not require them to consult communities. Although the authority of chiefs over land varies across tribes, chiefs are generally regarded as custodians of land and their decisions are not the outcome of participatory processes at the local level.¹³⁴

The literature reports numerous instances in which previous land users have been displaced because of the conversion of customary land and of its allocation to investors.¹³⁵ This has been confirmed by many interviewees who emphasized that “there is no such a thing as empty land”¹³⁶ and that “when you apply to convert large areas of land, it is impossible to find it empty, without any human activity!”¹³⁷

On the consultation process, many interviewees observed that the community is merely “informed”¹³⁸ after the letter of consent has been issued by the chief and the procedure to convert land has started. Moreover, some of the interviewees referred to the consultation as a “sensitization process”¹³⁹ in which, as noted by a chief, “we tell people what is going to happen, that the land is vacant, and that they should welcome

¹³² *Ibid.*, Section 8.

¹³³ *Ibid.*, Section 10.

¹³⁴ Mudenda, *Land Law in Zambia* 759-82.

¹³⁵ See for example: Phiri, Chu, and Yung, “Large-Scale Land Acquisitions and Development-Induced Displacement in Zambia: Lessons from Civil Society”; Nolte, “Large-Scale Agricultural Investments under Poor Land Governance in Zambia”.

¹³⁶ Ministry of Agriculture and Livestocks, Acting District Land Husbandry Officer, interview no. 10, Serenje, 9 February 2015.

¹³⁷ Chief B, interview no. 21, Mumbwa, 20 February 2015.

¹³⁸ Civil Society Organization, Social and Economic Justice Officer, interview no. 1, Lusaka, 26 January 2015; Ministry of Agriculture and Livestock, District Senior Agricultural Officer, interview no. 12, Serenje, 11 February 2015; Company C, Officers, interview no. 22, Lusaka, 22 February 2015.

¹³⁹ ZDA, Land Expert, interview no. 3; Ministry of Agriculture and Livestocks, Acting District Land Husbandry Officer, interview no. 10, Serenje, 9 February 2015; Chief A, interview no. 14, Chibale, 12 February 2015.

the investor.”¹⁴⁰ As such, the consultation does not appear as a participatory process: on the contrary, as argued by one of the interviewees, “consultation happens only at the top. It does not reach the people on the ground, it does not reach the bottom of the community.”¹⁴¹

The conversion of land already in use and the lack of community consultation are also reported by the focus group participants. Some community members affected by land investments lament that the land they were farming has been alienated without their consent; moreover, most of them report that the consultation happened only after the investors had taken possession of the land.¹⁴² Some farmers grieved that they were not informed of the alienation of land and that their crops were destroyed when the operations of the investor started.¹⁴³

Similarly to the abovementioned situation in which a payment is made to convert customary land, community consultations see two different *legalities* confronted: on the one hand, statutory norms (loosely) prescribe a participatory process, whereas on the other hand, customary norms concentrate the decision-making authority over land in the chiefs. In such a confrontation, powerful actors at the local level can successfully use this normative uncertainty to promote their interests. Chiefs strategically appeal to their role as custodians of the land under customary law and simplify the procedure to alienate land to investors, by centralizing the decisions and excluding the community from them. By doing so, they create a shortcut for investors, to whom the first steps of the land conversion process becomes simplified.¹⁴⁴ This

¹⁴⁰ Chief A, interview no. 14, Chibale, 12 February 2015.

¹⁴¹ Ministry of Agriculture and Livestock, District Senior Agricultural Officer, interview no. 12, Serenje, 11 February 2015.

¹⁴² Community Members, focus group discussion no. 1, Mpande, 13 February 2015; Community Members, focus group discussion no. 2, Moono, 20 February 2015.

¹⁴³ *Ibid.*

¹⁴⁴ The lack of participation of the community in the decisions over land can become problematic for investors, since local tensions can hinder the implementation of the projects. As noted by one of the

allows investors to save on financial resources, since all the expenses of the conversion procedure—including those related to community consultation and to site visits—are borne entirely by them.

The Contestation of Chiefdoms' Borders

It is important to note that the use of customary land for investment projects may be problematic for foreign investors. The process through which customary land is titled foresees an important role for chiefs and, as mentioned above, it provides them with the opportunity to capture rents. As noted in the literature, this may result in conflicts between chiefs pertaining to the authority over the land to be allocated to investors. Moreover, in some cases the negotiation with chiefs may not be successful, even when at a very advanced stage.

The South African company operating in Serenje had entered into negotiations with a chief in the area of Mkushi before. After a long negotiation with the support of ZDA, tensions emerged between two chiefs of the area, who both claimed authority over the land to be made available for investment. Notwithstanding the attempts by ZDA and District authorities to mediate, the conflict between the two chiefs was not solved and after 18 months of negotiations, the company was re-directed by ZDA to the area of Serenje, where it rapidly reached an agreement over the land to be used for its operations.¹⁴⁵

Similarly, the Indian company operating in Mumbwa found that, after the consent of the local chief to the conversion, another chief claimed authority over the

interviewees, it is only by “getting involved at the local level and obtaining the approval of the community” that tensions can be solved and operational peace can be achieved (Company A, Director, interview no. 13, Serenje, 11 February 2015).

¹⁴⁵ Ministry of Agriculture and Livestock, District Senior Agricultural Officer, interview no. 12, Serenje, 11 February 2015; Company A, Director, interview no. 13, Serenje, 11 February 2015.

land. The company operating in Mumbwa agreed to compensate the opposing chief in order to solve the problem and continue its operations.¹⁴⁶

It is to be noted that the borders between chiefdoms are demarcated in a map prepared by the colonial government in 1958; however, these borders are regularly contested and are considered out-of-date and imprecise.¹⁴⁷ In the case of land investments, chiefs understand the potential value of land and the conflicts over the borders re-emerge. In this contestation of authority, the investments may be delayed or may result in additional payments to solve the conflicts.

IV. Concluding Remarks

This Chapter has provided an overview on the land tenure system in Zambia and showed how this influences the way in which large-scale investments unfold in the country. The increase in the interest in land by foreign investors poses challenges to the land administration system that, due to the colonial history of the country, result from the interplay between state and customary authority.

Although, in principle land investments may benefit local communities by creating employment opportunities and developing infrastructure, their implementation at the local level appears to favour traditional leaders and investors at the expense of community members. By strategically appealing to customary law, chiefs successfully secure revenues from land investments and simultaneously allow investors to acquire land at extremely competitive prices. As emerged from the field research, local communities are excluded from this decision-making process and their interests are subordinated to those of investors and chiefs.

¹⁴⁶ Zambia Development Agency, Land Expert, interview no. 3, Lusaka, 20 January 2015; Company C, Officers, interview no. 22, Lusaka, 22 February 2015.

¹⁴⁷ Matt Sommerville et al., "Documenting Customary Land Rights in Zambia: A Low-Cost Open Source Approach," (Washington D.C.: USAID, 2016).

As emphasized above, land investments highlight the weaknesses of the land administration system and reinforce the trend, started with the 1995 land reform, towards the commodification of customary land. However, this commodification is currently *effective* only for some actors—investors and chiefs—who appropriate the benefits derived from this common resource, which on the contrary is not experienced as a commodity by the local community.

The ongoing sale of customary land by chiefs echoes colonial history, and in particular the agreements through which the Lozi King guaranteed to the British South Africa Company the exploitation of minerals on the land he controlled. Similarly to what many commentators have noted with respect to the colonial concessions, current land transactions are arguably illegal, both from the customary and statutory perspective, and result from the abuses and opportunistic behaviours that take place at the local level. As such, it is necessary to scrutinize current land transactions and the process through which they are implemented. In particular, more empirical research is needed to better understand the negotiations between investors and chiefs and the conditions under which chiefs agree to release land. As discussed in the Chapter, this aspect is pivotal, since it shapes the distributive outcomes of the investments.

The following Chapter will provide an analysis of land tenure in Ghana and discuss the results of the field research conducted there.

Chapter 4:

Large-scale Land Acquisitions in Ghana

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I. Introduction

Over the past ten years, large-scale acquisitions of land for agricultural development have increased at a rapid pace in Ghana. Many studies have provided figures in an attempt to quantify the amount of land that has been allocated to investors in the country,¹ but no official data is currently available and estimates vary significantly. This is partly due to the decentralized nature of land administration where land transactions are managed by traditional authorities within their area of influence (traditional area). Such a system would require comprehensive data collections in all the districts of the country, which however may not capture land transactions that are not disclosed both by investors and chiefs.² Moreover, land transactions are not always recorded with the

¹ See for example: Gad Asorwoe Akwensivie, "Towards Win-Win Outcomes from Large-Scale Land-Based Investments in Ghana," paper presented at the 2015 *World Bank Land and Poverty Conference* (Washington D.C., 2015); Lorenzo Cotula et al., "Testing Claims About Large Land Deals in Africa: Findings from a Multi-Country Study," *The Journal of Development Studies* 50, no. 7 (2014); George Schoneveld and Laura German, "Translating Legal Rights into Tenure Security: Lessons from the New Commercial Pressures on Land in Ghana," *Journal of Development Studies* 50, no. 2 (2014). This aspect will be discussed in Section III of this Chapter.

² In the field research, a similar case was found. Notwithstanding clear elements in the literature concerning the presence of a large-scale land investment in the district of Beposo and Nsuta, which was also confirmed by the investors' list provided by the Ghana Investment Promotion Center, the local informants interviewed categorically denied the presence of the company in the stool land. The paramount chief stated that "I will not give the land to any company because they only want to trick you, they don't work the land and don't respect the promises" (Nsuta Traditional Council, Paramount Chief, interview no. 12, Nsuta, 29 November 2014) but during the interview he alluded to the presence of the company while at the same time providing contradictory information and showing clearly that he was not willing to disclose any information. The company was contacted but declined the request to participate in this research.

competent authorities so that existing land records are not fully accurate and up-to-date.³ In addition, the institutions mandated with the promotion of investments, namely the Ghana Investment Promotion Center and the Ghana Free Zones Board, do not have a record of land leases in which registered companies are involved.

As such, only a partial picture of the size of large-scale land acquisition may be provided. However, this research did not focus on “quantifying” the land transactions, but rather on understanding the process through which they take place and the challenges they pose. In this sense, a clear image of land-based investments in the country was obtained through the field research conducted between October and January 2014. The first round of interviews held in Accra provided a preliminary indication of the areas where large-scale land investments were taking place, thanks to the input of government institutions and civil society organizations. Interviews in Kumasi also contributed to the identification of investment cases in rural districts, which became the object of field visits and further interviews.

Additional research was conducted in three rural districts: Asante Akin North (Ashanti region), Atebubu-Amantin (Brong-Ahafo region), and Pru (Brong-Ahafo region).⁴ There, interviews with key informants and focus group discussions with community members affected by land investments were conducted. The research did not include districts in the Northern Provinces, where the land tenure system—as the next

³ As some studies have noted, the process of land registration in Ghana is very long, cumbersome, and expensive and as such only a minority of titles are regularly registered (Janine Ubink, "Tenure Security: Wishful Policy Thinking or Reality? A Case from Peri-Urban Ghana," *Journal of African Law* 51, no. 2 (2007); Kojo Sebastian Amanor, "Sustainable Development, Corporate Accumulation and Community Expropriation: Land and Natural Resources in West Africa," in *Land and Sustainable Development in Africa*, ed. Kojo Sebastian Amanor and Sam Moyo (London: Zed Books, 2008). With regards to large-scale investments in agriculture, the literature shows that the majority of land transactions and titles are not registered (Akwensivie, "Towards Win-Win Outcomes from Large-Scale Land-Based Investments in Ghana."; Laura German, George Schoneveld, and Esther Mwangi, "Contemporary Processes of Large-Scale Land Acquisition in Sub-Saharan Africa: Legal Deficiency or Elite Capture of the Rule of Law?," *World Development* 48, (2013). This issue will be discussed more in detail in the following sections.

⁴ See Illustration I.

Section will explain—evolved in a different way due to the nationalization of land during colonialism, which was followed by the introduction of Native Authorities for the purpose of indirect rule. The Ashanti and Brong-Ahafo regions illustrate clearly the land tenure traits of the country and at the same time, according to the data available, received significant interest from investors.

Access to the field in rural areas posed challenges, especially where land transactions had resulted in local controversy and contestation. In some cases, companies were not willing to disclose information concerning their investment or to provide details on the relation with the traditional leaders of the area.⁵ Contracts were only disclosed in one district (Asante Akim North), but no copy or transcript of it was allowed. Notwithstanding these limitations, the field research confirmed some of the trends identified in the literature and provided new evidence on large-scale land acquisition processes.

In order to situate land investments in the broader context of land tenure and legal pluralism, this Chapter will first provide an historical overview of the land administration system of the country, starting from the colonial era until today. The central notion of inalienability of customary land will be discussed, together with the contradictions highlighted by empirical research. This Chapter will then introduce the regulation of agricultural investments in the country and it will briefly present key government policies that provide incentives to investors in this field. It will then illustrate the process through which foreign investors may acquire land in Ghana and finally discuss the results of the fieldwork, with particular emphasis on the involvement of the communities and the inalienability of customary land.

⁵ This was especially the case in the Atebubu-Amantin and Pru District, as Section III will discuss.

II. Land Tenure and Chieftaincy: From the Gold Coast Colony to Contemporary Ghana

In Ghana, as in most sub-Saharan African countries, the role of customary law remains central in regulating multiple aspects of life ranging from family to property law. The current constitutional framework recognizes customary law as one of the sources of law in the country and defines it as "the rules of law, which by custom are applicable to particular communities in Ghana."⁶

In the management of land, the role of customary law is pivotal and Ghana has a unique land tenure system that revolves around traditional authorities, which are comprised of the chiefs, heads of family or earth priests.⁷ The pluralist arrangements governing land tenure in Ghana foresee that the majority of land is vested in the traditional authorities, who are therefore responsible for its management. In this work, the terms "traditional authority," "customary authority," and "chief" will be used interchangeably to refer to "the head or leader of a tribe or clan in a town or village... who is in charge and answerable to the people in the town or village."⁸ The Constitution of Ghana defines as traditional authority

a person who, hailing from the appropriate family or lineage, has been validly nominated, elected or selected and enstooled, enskinned or installed as a chief or queenmother in accordance with the relevant customary law and usage.⁹

Traditional authorities are hierarchically organized within the traditional council, of which one exists for each traditional area.¹⁰ The traditional council includes the

⁶ Constitution of Ghana, 1992, Article 11.

⁷ For the different customary arrangements in the country, see footnote no. 10.

⁸ S.A. Brobbey, *The Law of Chieftaincy in Ghana* (Accra: Advanced Legal Publications, 2008), 32.

⁹ Constitution of Ghana, 1992, Article 277; Chieftaincy Act, 2008, Section 57. The terms "enstool" and "enskin" refer to the symbols of traditional authority – the Stool in the South and Center of Ghana and the skin in the North of the country. For a discussion of chieftaincy in Ghana, see for example: Anthony Allot, *Essays in African Law, with Special Reference to the Law of Ghana* (Londra: Butterworth & Co., 1960); Janine Ubink, "Traditional Authority Revisited: Popular Perceptions of Chiefs and Chieftaincy in Peri-Urban Kumasi, Ghana," *Journal of Legal Pluralism and Unofficial Law* 55 (2007).

paramount chief, who leads it, the divisional chiefs, who respond to the paramount chief, and the sub-divisional chiefs, who in turn are accountable to their divisional as well as paramount chief.

This Section will discuss the key features of land administration in Ghana by first providing a brief historical overview and then illustrating current legal arrangements and issues arising thereof.

British Colonization and the Lands Ordinances

The colonization of Ghana started with trade contacts by the Portuguese, who in the 15th century established trading posts along the West African coastline.¹¹ Dutch, British, and Danish merchants who also sought to participate in the growing slave trade, of which Ghana was at the center, soon followed. In the 19th century the British presence consolidated in the country. This included signing treaties with local rulers, important amongst which was the one signed with the Fante Confederation in 1844.¹² After the purchase of Dutch and Danish territories, in 1874 the British founded the Gold Coast Colony that comprised of the coastal territory of modern day Ghana. The struggle to control the natural resources in the interior of Ghana saw the British and Ashanti

¹⁰ The customary administration is different in the North of the country, where both Paramount Chiefs and Earth Priests play the role of customary authorities. This research focuses on the rest of the country and particularly on the Ashanti and Brong-Ahafo regions, where Paramount Chiefs are fully responsible for land management. For a discussion of the specificities of customary administration in the North of the country, see for example: Stefano Boni, "Traditional Ambiguities and Authoritarian Interpretations in Sefwi Land Disputes," in *Contesting Land and Custom in Ghana. State, Chief and the Citizen*, ed. Janine Ubink and Kojo Sebastian Amanor (Leiden: Leiden University Press, 2008); Steve Tonah, "Chiefs, Earth Priests and the State: Irrigation Agriculture, Competing Institutions and the Transformation of Land Tenure Arrangements in Northeastern Ghana," *ibid.*; Carola Lentz, "Is Land Inalienable? Historical and Current Debates on Land Transfers in Northern Ghana," in *Colloque international 'Les frontières de la question foncière – At the frontier of land issues'* (Montpellier, France 2006).

¹¹ For a review of colonial history in Ghana, see: David Kimble, *A Political History of Ghana: The Rise of Gold Coast Nationalism, 1850-1928* (London: Clarendon Press, 1963); Jhon D. Fage, *A History of West Africa: An Introductory Survey* (Cambridge: Cambridge University Press, 1969).

¹² Through the "Fantee Chiefs Declaration" also known as "Bond" the Fante states acknowledged the "power and jurisdiction" of the Crown (Kojo Sebastian Amanor, "The Changing Face of Customary Land Tenure," in *Contesting Land and Custom in Ghana. State, Chief and the Citizen*, ed. Janine Ubink and Kojo Sebastian Amanor (Leiden: Leiden University Press, 2008).

Empire, which at the time ruled the area, engaged in a series of wars from 1824 to 1901. This culminated in the British occupation of Kumasi, the Ashanti capital, in 1895. It was only in 1902 that the British Colony entirely annexed the territories in the North formerly controlled by the Ashanti Empire.¹³

The expansion of British control in the Colony went together with an increasing exploitation of natural resources, which became the object of several Ordinances of the colonial administration. The first colonial regulation concerning land was the Public Land Ordinance of 1876, through which public purpose land acquisitions were introduced. The Ordinance foresaw the payment of a compensation for forcible acquisitions, except when the land acquired was “unoccupied” – a term which became the center of a significant controversy with local chiefs. Defined as land for which no beneficial use in terms of cultivation, inhabitation, water storage and collection, and industrialization could be proved,¹⁴ unoccupied land was a contradiction in terms for local chiefs: *all* the land in the country could be proven to be beneficially used, considering that shifting cultivation was practiced and required the use of fallow land. As such, uncultivated land was, according to local chiefs, still to be considered occupied and *used*.¹⁵

The negative reaction of the chiefs to the Public Land Ordinance confronted the British administration with the need to regulate land in accordance with native customs. In light of this, the colonial administration proposed a new Bill in 1894 to regulate land management.¹⁶ However, by retaining control over land chiefs were able to profit from its rapid rise in demand. As Amanor reported, “in the 1890s more than 400 mining

¹³ For an account of the colonial encounter in Ghana and its impact on land tenure, see for example: Sara Berry, "Hegemony on a Shoestring: Indirect Rule and Access to Agricultural Land," *Africa* 62, no. 3 (1992); Janine Ubink and Kojo Sebastian Amanor, eds., *Contested Land and Custom in Ghana. State, Chiefs and the Citizen* (Leiden: Leiden University Press, 2008).

¹⁴ C.K. Meek, *Land Law and Custom in the Colonies* (Oxford: Oxford University Press, 1946).

¹⁵ Berry, "Hegemony on a Shoestring: Indirect Rule and Access to Agricultural Land".

¹⁶ Meek, *Land Law and Custom in the Colonies*, 170.

companies were established on the Gold Coast and vast tracts of land were given out as concessions.”¹⁷ Meek described these transactions as “wholesale alienations by chiefs at the expense of native occupiers.”¹⁸ As such, the lack of regulation over land transactions was of great concern to the British administration, which was not yet able to ensure their taxation and control.

As a reaction, and to formalize control over the resources of the Colony, with the Crown Lands Bill the British administration attempted to vest all the waste land, forest land and minerals of the Colony in the Crown.¹⁹ This transfer of property rights to the Crown, which was successful in other British and French colonies,²⁰ was again met with stiff opposition from local chiefs. While vesting land in the Crown, the Bill guaranteed the respect of natives’ rights to occupy and use land and it required the consent of the colonial Governor before the granting of any land concession by chiefs. This provision too was fiercely criticized by local chiefs who argued that it was in clear contradiction with local customs. Following the presentation of this Bill, chiefs across the country mobilized to oppose it. At the same time, British traders feared that the Crown Lands Bill would concentrate control over land in the colonial administration and thus reduce trade opportunities in the Colony.²¹ Moreover, the traders did not welcome the prospect of levies on land concessions.

After intense opposition to the 1894 Bill, the colonial administration deferred its adoption and in 1897 it proposed a new Lands Bill, which again was not welcomed by local chiefs. The new Bill curtailed the chiefs’ prerogatives in land management, by

¹⁷ Amanor, "The Changing Face of Customary Land Tenure," 58.

¹⁸ Meek, *Land Law and Custom in the Colonies*, 171.

¹⁹ *Ibid.*

²⁰ On this aspect, see: Hastings Winston Opinya Okoth-Ogendo, "The Tragedy of African Commons: A Century of Expropriation, Suppression and Subversion," in *Occasional Paper* (Cape Town: University of the Western Cape, 2002); Liz Alden Wily, "‘The Law Is to Blame’: The Vulnerable Status of Common Property Rights in Sub-Saharan Africa," *Development and Change* 42, no. 3 (2011).

²¹ For more details on these historical developments, see Amanor "The Changing Face of Customary Land Tenure."

foreseeing the right of the Governor to approve any land concession made by them, except those benefitting natives for agricultural, industrial or trading use.²² The chiefs' dissent to the Bill was channeled through the Aborigines Rights Protection Society (ARPS), an alliance of local chiefs and elites that aimed to influence colonial policy. The ARPS played a central role in coordinating the resistance and petitions of locals by arguing that land in the Colony belonged to the natives and that as such the proposed Bill was unconstitutional. Following a strong mobilization, which included the expedition of an ARPS delegation to London to negotiate directly with the British government, the Bill was withdrawn to ease the tension with the local chiefs.²³

Following the protests in the 1890s, the stance adopted by the colonial administration towards land in the Gold Coast respected the role of chiefs in the South and the Ashanti region, whereas unoccupied lands in the Northern Territories were successfully vested in the Crown through the 1902 Northern Territories Ordinance which proclaimed them as "public lands." Meek justified the different status of land across the Colony by looking at population density and arguing that in the North "there were large areas of unclaimed land which could be preserved for the benefit of the community." In the rest of the Colony, the spread of cocoa cultivation—and the wealth it produced—led to an increased pressure over land, from which local chiefs benefitted through the control they had on land.

The role and jurisdiction of chiefs within the colonial administration was consolidated in the policy of "indirect rule". Indirect rule entailed that traditional authorities contributed to colonial administration by exerting administrative, legislative, and judicial authority – an efficient method of controlling the territory, which reduced

²² Meek, *Land Law and Custom in the Colonies*.

²³ *Ibid.*

the need for European personnel in the Colony.²⁴ The role played by traditional authorities in the framework of indirect rule contributed to modifying and shaping customary law, in a process that legal pluralist scholars define as “hybridization.”²⁵ With regards to land tenure, according to authors like Amanor,²⁶ Berry,²⁷ Lenz,²⁸ and Ubink²⁹ in the colonial period the “creation” of tradition crystallized, so that land came to be conceived as inalienable and held in trust by chiefs on behalf of their communities. In different ways, these authors highlighted that in the struggle to control the resources of the country, local elites stood to gain from the recognition of chiefs as the only owners of the land. In this process of “territorialisation of traditional rule,”³⁰ the role of chiefs came to be defined by the territory they controlled (the traditional area), and not by the community they lead. As Berry explained,

before the colonial era, chiefs exercised authority over people separately from their authority over land. A person did not need to reside or work on stool land in order to be considered a ‘subject’ of the stool in question, nor did ‘strangers’ owe allegiance to the stool on whose land they happened to reside. To facilitate the incorporation of ‘loyal’ chiefs into the apparatus of colonial rule, officials sought to link chiefs’ administrative and judicial responsibilities to territorially bounded jurisdictions.³¹

The role of the chief as a territorial authority implied a differential treatment for community members and “strangers”³² in relation to land use. In particular, “customary

²⁴ A discussion of colonial policy and indirect rule is beyond the scope of this work. In this regard, see: Mahmood Mamdani, *Citizen and Subject. Contemporary Africa and the Legacy of Late Colonialism* (Princeton: Princeton University Press, 1996). For Ghana, see: Sara Berry, *No Condition Is Permanent: The Social Dynamics of Agrarian Change in Sub-Saharan Africa* (Madison, Wisconsin: University of Wisconsin Press, 1993).

²⁵ Boaventura de Sousa Santos, "The Heterogeneous State and Legal Pluralism in Mozambique," *Law & Society Review* 40, no. 1 (2006). For a theoretical discussion of this aspect, see Chapter 1.

²⁶ Ubink and Amanor, *Contested Land and Custom in Ghana. State, Chiefs and the Citizen*.

²⁷ See for example: Sara Berry, "Property, Authority and Citizenship: Land Claims, Politics and the Dynamics of Social Division in West Africa," *Development and Change* 40, no. 1 (2009).

²⁸ Lenz, "Is Land Inalienable? Historical and Current Debates on Land Transfers in Northern Ghana".

²⁹ See for example: Janine M. Ubink, "Negotiated or Negated? The Rhetoric and Reality of Customary Tenure in an Ashanti Village in Ghana," *Africa: Journal of the International African Institute* 78, no. 2 (2008).

³⁰ Ulrike Schmid, "Legal Pluralism as a Source of Conflict in Multi-Ethnic Societies: The Case of Ghana," *Journal of Legal Pluralism and Unofficial Law* 33, no. 46 (2001): 6.

³¹ Berry, "Property, Authority and Citizenship: Land Claims, Politics and the Dynamics of Social Division in West Africa," 31.

³² Berry, *No Condition Is Permanent: The Social Dynamics of Agrarian Change in Sub-Saharan Africa*.

laws allow chiefs to collect land rent from strangers, but not from members of the local community over which they exercise jurisdiction.”³³ Under customary law community members are granted usufruct rights in as much as there is land available,³⁴ whereas “outsiders” may obtain usufruct on land only when the chief agrees and against a payment. Historically, this ensured that chiefs could benefit from the rents derived from land transactions outside of the community, while at the same time being shielded from the influence of the State.³⁵

This aspect of customary law and its evolution is still controversial in the literature;³⁶ regardless of the status of land tenure before colonization and to whether chiefs had always been considered as custodians of land, it is important to stress that British policy deeply influenced customary law and land tenure, particularly through indirect rule.

As a result of this historical path, chiefs have come to be recognized as custodians of land on behalf of their stool, to which the allodial title belongs. As clarified by Kasanga and Kotey, the allodial title—which is not foreseen as such by the Constitution but is the outcome of doctrinal and judicial elaboration—is “the superior interest in land” and “the position of every allodial titleholder of land in Ghana is that of

³³ Berry, "Property, Authority and Citizenship: Land Claims, Politics and the Dynamics of Social Division in West Africa," 30.

³⁴ In this sense, see: Catherine Boone, "Land Tenure Regimes and State Structure in Rural Africa: Implications for Forms of Resistance to Large-Scale Land Acquisitions by Outsiders," *Journal of Contemporary African Studies* 33, no. 2 (2015): 179. It is to be noted that the terminology to described customary interest in land is controversial; on this aspect, see footnote no. 54.

³⁵ As discussed in Chapter 1, this work does not aim to contribute to the vast literature concerning the invention of tradition and the authenticity of customary law. This critical approach to customary law has been taken into account in an effort to dismantle power asymmetries within local communities and identify winners and losers from land transactions.

³⁶ Some authors question the “idyllic” and “romanticized” idea of customary law and, with regards to land tenure, argue that land inalienability and communal tenure in the pre-colonial period are but an invention of Europeans, supported by local elites who stood to gain from this interpretation of tradition. These critical positions oppose the mainstream view that describes customary law as a bottom-up set of rules created by local communities in response to their needs. For a discussion of these conflicting visions, see Chapter 1.

a titular holder, holding the land in trust for the whole community.”³⁷ By referring to the seminal work of Allot,³⁸ Schmid highlighted that allodial title combines “the ‘interest of benefit’ and the ‘interest of control’” and explained that

‘benefit’ would include any entitlement to exploit the land, meaning the actual use of the land, whereas ‘control’ would mean only the power to decide who may benefit from the land, when and in what circumstances.” Within the concept of the allodial title, both aspects are combined. On the one hand, chiefs perform functions of administration of land and conflict settlement within a community and represent the community in conflicts with external actors over land... On the other hand, the allodial title implies an ‘interested trusteeship’ by the Chief of the land by assigning to him as the responsible ‘traditional authority’ an income out of transactions with land.³⁹

As such, the allodial title, which is vested in chiefs on behalf of their stool, confers to chiefs the power to dispose of land in the interest of the community they leads and grants them the right to appropriate the benefits deriving from land. Representing the allodial rights of the stool, traditional authorities may allocate interests on land ranging from usufruct, the highest interest after the allodial title, to sharecropping tenancies and leaseholds.

The role of chiefs as custodians of land concurred to the consolidation of the customary rule according to which land may not be sold. Although, as this Chapter will explain, several instances of land sales have been documented in the country, both during the colonial period and in contemporary Ghana,⁴⁰ the inalienability of land is considered a key tenet of land administration.

³⁷ Kasim Kasanga and Nii Ashie Kotey, *Land Management in Ghana: Building on Tradition and Modernity* (London: International Institute for Environment and Development, 2001), 13.

³⁸ Allot, *Essays in African Law, with Special Reference to the Law of Ghana*.

³⁹ Schmid, "Legal Pluralism as a Source of Conflict in Multi-Ethnic Societies: The Case of Ghana."

⁴⁰ In this sense, see for example: Amanor, "The Changing Face of Customary Land Tenure."; Janine Ubink, "Courts and Peri-Urban Practice: Customary Land Law in Ghana," *University of Ghana Law Journal* 4, no. 22 (2002).

Land Tenure in Independent Ghana: Public and Private Land

Ghana was the first African country to gain its independence in 1957. The end of colonialism did not alter the structure of the land system in place at the time, whose key characteristics are still in force today. This has been the case in most of the African continent where, as Larbi and others noted,

after independence, rather than restructure land relations in accordance with new development imperatives, African countries simply entrenched, and sometimes expanded the scope of colonial policy and law depending on local circumstances, politics, patronage and objectives.⁴¹

The first Ghanaian President, Kwame Nkrumah, eliminated the Native Authorities system established by the British and attempted to curtail the power of chiefs, due to the role they played in the colonial period by supporting the British administration through indirect rule.⁴² Notwithstanding the new laws introduced to increase State control over land,⁴³ the ultimate authority of chiefs in land tenure was not challenged.⁴⁴ Furthermore, public land that was previously vested in the British Crown became vested in the President through the State Property and Contracts Act of 1960.

The defeat of Nkrumah, overthrown in 1966, opened a new political season in which chiefs managed to lobby successfully in order to consolidate their control over land. In particular, the 1979 Constitution reversed the appropriation of land in the North that had taken place during the British rule. The land that had been declared as public in the former Northern Territories was reverted to the authority of chiefs and to their communities. This land restitution is also foreseen in the current 1992 Constitution⁴⁵—

⁴¹ Wordsworth Larbi, Odame Adarkwah Antwia, and Paul Olomolaiyea, "Compulsory Land Acquisition in Ghana—Policy and Praxis," *Land Use Policy* 21, no. 1 (2004).

⁴² For an in-depth analysis of Nkrumah's relation with chiefs, see: Richard Rathbone, *Nkrumah & the Chiefs. The Politics of Chieftaincy in Ghana 1951-60* (Oxford: James Currey, 2000).

⁴³ Amongst them the State Lands Act, 1962 and the Administration of Lands Act, 1962.

⁴⁴ Berry, "Property, Authority and Citizenship: Land Claims, Politics and the Dynamics of Social Division in West Africa".

⁴⁵ Constitution of Ghana, 1992, Article 257.3.

which closed military rule in the country and resulted from free elections—and was justified as an attempt to harmonize land management across the country.⁴⁶

In continuity with the past, land in Ghana may be classified into public and private land. The 1992 constitutional provisions also clarify that the managers of land have obligations towards the wider community by stating that

the State shall recognise that ownership and possession of land carry a *social obligation to serve the larger community* and, in particular, the State shall recognise that the managers of public, stool, skin and family lands are fiduciaries charged with the obligation to discharge their functions for the benefit respectively of the people of Ghana, of the stool, skin, or family concerned and are accountable as *fiduciaries* in this regard [emphasis added].⁴⁷

These obligations apply both to the State and traditional authorities, and are to be read in conjunction with the status of land—whether public or private—as defined by the Constitution.

Public land is vested in the President of Ghana and is defined as

any land which, immediately before the coming into force of this Constitution, was vested in the Government of Ghana on behalf of, and in trust for, the people of Ghana for the public service of Ghana, and any other land acquired in the public interest, for the purposes of the Government of Ghana before, on or after that date.⁴⁸

In simple terms, public land encompasses all the land that has been acquired by the State for public purpose and the land vested in the President following the provisions of the Administration of Lands Act of 1962.⁴⁹ According to the literature, public land constitutes approximately 20 percent of the national territory.⁵⁰

⁴⁶ Berry, "Property, Authority and Citizenship: Land Claims, Politics and the Dynamics of Social Division in West Africa." On contemporary land tenure in the North of Ghana, see: Joseph A. Yaro, "Re-Inventing Traditional Land Tenure in the Era of Land Commoditization: Some Consequences in Periurban Northern Ghana," *Human Geography* 94, no. 4 (2012).

⁴⁷ Constitution of Ghana, 1992, Article 36.8.

⁴⁸ Constitution of Ghana, 1992, Article 257.2.

⁴⁹ This Act enabled the President to "declare any stool land to be vested in him in trust" (Section 7) in cases of public interest, without the payment of any compensation to the Stool – which instead is foreseen in the case of compulsory land acquisition.

⁵⁰ Kasanga and Kotey, *Land Management in Ghana: Building on Tradition and Modernity*.

The remaining 80 percent of land in the country is private land, i.e., stool, skin and family land.⁵¹ This type of land is governed by customary law where chiefs (for stool land), earth priests (for skin land)⁵² and heads of families (for family lands) are recognized by the Constitution as land managers on behalf of their respective communities. According to customary law, community members may use land freely; for outsiders, prior permission of the chief is required in exchange for a payment.⁵³ This permission may result in customary usufructs,⁵⁴ in share-tenancy arrangements like *abusa* or *abuna*, which foresee that tenants and landowners share their harvest,⁵⁵ or in lease contracts, which for foreigners are subject to the constitutional provision according to which

no interest in, or right over, any land in Ghana shall be created which vests in a person who is not a citizen of Ghana a leasehold for a term of more than fifty years at any one time.⁵⁶

Moreover, the Constitution clarifies that foreigners may not hold a freehold interest on land in the country.⁵⁷

⁵¹ *Ibid.*

⁵² As clarified by Brobbey, “the maintenance of stool or chiefs out of stool lands is more common in most Akan stool areas in Western, Central, Ashanti, Brong Ahafo and part of the Eastern Regions. There are some areas where the stool has no land as such. In such places lands have been established to belong to individual families... Skin lands do exist, but because of the protectorate system in the past, many of the skin lands have been vested in the government. Efforts are being made to reverse land ownership in skin areas so as to grant traditional authorities greater control over skin lands.” (*The Law of Chieftaincy in Ghana*, 354-55).

⁵³ On this payment, also called “drink-money” (Janine Ubink and Julian F. Quan, “How to Combine Tradition and Modernity? Regulating Customary Land Management in Ghana,” *Land Use Policy* 25, no. 2 (2008)) see the next Section.

⁵⁴ This terminology is controversial; as reported by Woodman, in 1971 Benti-Etchill proposed to refer to “customary freehold”- a terminology not accepted by traditional authorities who instead argued that the allodial title may not be affected by the use rights of the community members (Gordon R. Woodman, *Customary Law in Ghanaian Courts* (Accra: Ghana University Press, 1996). This aspect will be discussed in the Section devoted to land registration.

⁵⁵ Kasanga and Kotey, *Land Management in Ghana: Building on Tradition and Modernity*.

⁵⁶ Constitution of Ghana, 1992, Article 266.4.

⁵⁷ Constitution of Ghana, 1992, Article 265.

The Interplay of State and Traditional Institutions

Although traditional authorities manage stool lands, state institutions also contribute to their administration. Amongst the many involved, it is worthwhile to mention only the central institutions, namely the Lands Commission and the Office of the Administrator of Stool Land.⁵⁸

The Lands Commission, the entity created by the Lands Commissions Act of 1971 and responsible for the management of public lands on behalf of the President,⁵⁹ plays an important role in the management of customary land as well. According to its constitutional mandate, the Lands Commission is responsible for ensuring that stool land use is consistent with the development plan of the area by providing its consent before the allocations of stool land.⁶⁰ Empirical research, however, has shown that

in practice, consent before an allocation of stool land is never sought. Concurrence after the allocation is sometimes sought, although not by the chief, but by lessees who want to formalize their acquisition, and this is still quite rare. Typically only the more educated people or people with connections in the bureaucracy go through the long, cumbersome and expensive process of formalization... It takes on average between six months and two years to process a document submitted to the Lands Commission... The provision of consent and concurrence is not enforced by the LC and therefore does not in practice provide an effective check upon the administration of lands by chiefs.⁶¹

Moreover, the constitutional provision sets a very vague requirement when it indicates that allocations of land should be consistent with development plans for the area. Some authors note that this consent, where sought, contributes to increasing the price of land

⁵⁸ For an overview of the agencies involved in land management, see Kasanga and Kotey, *Land Management in Ghana: Building on Tradition and Modernity*.

⁵⁹ It is to be noted that the political change following the military coup in 1981 impacted on the Constitution and the provisions concerning the Lands Commission. The current legal framework for this institution is provided by the 1992 Constitution and the Lands Commission Act, 2008. The 2008 law aimed to streamline land administration and it merged the previous institutions involved in land management.

⁶⁰ Constitution of Ghana, 1992, Article 258.1.b.

⁶¹ Ubink and Quan, "How to Combine Tradition and Modernity? Regulating Customary Land Management in Ghana," 201. Similar findings are reported by Akwensivie, "Towards Win-Win Outcomes from Large-Scale Land-Based Investments in Ghana." The field research confirmed this tendency, as the next Section will discuss.

due to the unofficial payments needed for the administrative procedure, in the form of bribes.⁶²

Alongside the Lands Commission, an important role is foreseen for the Office of the Administrator of Stool Lands. Among other tasks, this entity, established by the Lands Commission Act of 1994, is responsible for the collection of “all rents, dues, royalties, revenues or other payments whether in the nature of income or capital from stool land”.⁶³ These revenue streams are to be distributed following the constitutional formula which foresees that 10 percent is allocated to the Office of the Administrator of Stool Lands, and the rest is further distributed to the stool “stool through the traditional authority for the maintenance of the stool in keeping with its status”⁶⁴ (25 percent), to the traditional authority (20 percent), and to the District Assembly, the decentralized organ of the Government (55 percent).⁶⁵

The implementation of this revenue collection task has proven complex, due to the resistance of traditional authorities to share the revenue stream deriving from stool land. As discussed in the literature, the chiefs justify this resistance by referring to customary law and in particular the concept of “drink money”. “Drink money”, as Ubink clarifies, is described by chiefs as

the custom of bringing some drinks to the chief when acquiring land from him as an acknowledgement of the ownership of the land, to show allegiance towards the chief, and for the customary pouring of libations on the ground to seek the Gods’ blessings for the transaction.⁶⁶

⁶² Julian Quan, Janine Ubink, and Adarkwah Antwi, “Risks and Opportunities of State Intervention in Customary Land Management: Emergent Findings from the Land Administration Project Ghana,” in *Contesting Land and Custom in Ghana. State, Chief and the Citizen*, ed. Janine Ubink and Kojo Sebastian Amanor (Leiden: Leiden University Press, 2008), 198.

⁶³ Constitution of Ghana, 1992, Article 267.2.b.

⁶⁴ Constitution of Ghana, 1992, Article 267.6.

⁶⁵ *Ibid.*

⁶⁶ Ubink and Quan, “How to Combine Tradition and Modernity? Regulating Customary Land Management in Ghana,” 205.

The increasing pressures on land, which is particularly evident in peri-urban areas due to the increasing urbanization of the country, has brought about a change in the practice of “drink money” so that

whereas a bottle of Schnapps⁶⁷ was sufficient in times of land abundance... in peri-urban Ghana and other areas where land is highly valued and demand is increasing, the amount of cash demanded has gradually risen and now effectively constitutes a market price for the purchase of land leases... The chiefs continue to call this payment ‘drinks’ and claim that it should therefore not be regarded as ‘stool land revenue’ in the sense of the OASL Act, and they resist the disclosure of the sums collected.⁶⁸

The refusal of chiefs to consider “drink money” as revenue from stool land according to the Constitution offers them more opportunities to capture rents from land transactions outside of the control of state authorities. This tendency has been confirmed by the fieldwork, as Section III will discuss. As Ubink reports,⁶⁹ no court has this far decided on whether “drink money” should be considered part of the definition of stool land revenues, and as such chiefs may continue to appropriate these revenues entirely.

It shall be noted that, according to customary law and as confirmed by case-law,⁷⁰ the usufruct rights of landholders may be revoked by the allodial title holder (and therefore by the chief who represents the stool) when this is in the interest of the community, in exchange for the payment of a compensation. However, case-law preceding the 1992 Constitution had compared the rights of usufruct holders to full ownership.⁷¹ As such, the interpretation of usufruct rights and the boundaries of allodial title remain open for contestation, although no recent case-law is available on this

⁶⁷ Schnapps is imported liquor traditionally used to pay homage to the chief, who in turn used it for libations.

⁶⁸ Ubink and Quan, "How to Combine Tradition and Modernity? Regulating Customary Land Management in Ghana," 204.

⁶⁹ *Ibid.*

⁷⁰ See for example the following cases reported by the Ministry of Food and Agriculture of Ghana: Ohimen v. Adjei, [(1957) 2 WALR 275]; Mansu v. Abboye and Another, [1982-83] GLR 1313] Tawiah v. Gyampo [1957, 3 WALR, 293]; Amoabimaa v. Okvir [1963, GLR (SC)] (Ministry of Food and Agriculture, "Ghana Commercial Agriculture Project: Recommendations for Large-Scale Land-Based Investment in Ghana," (Accra: Government of Ghana, 2015), 90).

⁷¹ The Ministry of Food and Agriculture reports the following cases: Lokko v. Konkofi (1907), Renn. 450 (D.C. and F.C.), Kotei v. Asere Stool (1961) GLR 492 (*ibid.*)

matter.⁷² As this Chapter will discuss, empirical studies have shown that chiefs are alienating land already subject to usufruct rights, often without granting any compensation to the rights holders.⁷³

Security of Tenure and Title Registration

As mentioned above, the 1992 Constitution of Ghana forbids the sale of stool lands by clearly stating that “no interest in, or right over, any stool land in Ghana shall be created which vests in any person or body of persons a freehold interest howsoever described.”⁷⁴ This provision partly conflicts with the land title registration policy that had been introduced in the 1980s, as this Section will discuss.

The land tenure system of the country, with the abovementioned interplay of customary and state law, has been defined, among others, as “complex,” “confusing,”⁷⁵ “contradictory,” and “poorly articulated.”⁷⁶ Some studies have highlighted that the lack of a consistent legal framework for land tenure leaves room for opportunistic behaviors of local elites,⁷⁷ whereas others have drawn attention to the lack of tenure security across the country.⁷⁸

In line with the international policy prescriptions that were elaborated starting from the 1960s, Ghana—like most African countries—engaged in a series of reforms aimed at reducing “tenure insecurity” by formalizing land titles. This type of policy, as

⁷² The lack of recent case-law is also remarked by the Ministry of Food and Agriculture (*ibid.*)

⁷³ Ubink and Quan, “How to Combine Tradition and Modernity? Regulating Customary Land Management in Ghana”.

⁷⁴ Constitution of Ghana, 1992, Article 197.5.

⁷⁵ Thomas Shaw, “The Integration of Multiple Layers of Land Ownership, Property Titles and Rights of the Ashanti People in Ghana,” *Urban Forum* 24(2013).

⁷⁶ Kasanga and Kotey, *Land Management in Ghana: Building on Tradition and Modernity*.

⁷⁷ Schoneveld and German, “Translating Legal Rights into Tenure Security: Lessons from the New Commercial Pressures on Land in Ghana.”; Lentz, “Is Land Inalienable? Historical and Current Debates on Land Transfers in Northern Ghana”.

⁷⁸ LandAC, “Food Security and Land Governance Factsheet: Ghana,” (Utrecht: LandAC, 2016). On the use of the concept of tenure insecurity, see the critical analysis of Pauline Peters (“Conflicts over Land and Threats to Customary Tenure in Africa,” *African Affairs* 112, no. 449 (2013)).

discussed in Chapter 2, was based on the idea that customary land systems are inefficient and do not allow for the development of individual rights, which to the contrary would “strengthen claims to the fruits of investment, increase access to capital, allow for gains from trade, and provide the cultivator with freedom to innovate.”⁷⁹

It is to be noted that the Registration Ordinance of 1883 and the Land Registry Ordinance of 1895, which were later replaced by the Land Registry Act of 1962 and still in force, already introduced land deeds registration in the colonial period. This system allowed for the registration of transactions concerning stool land but its implementation has proven problematic, in particular due to multiple registrations, which generate litigation and uncertainty.⁸⁰

The attempt to introduce land titles registration in the country, as opposed to the deeds registration already in place, followed the first structural adjustment loan, which aimed at responding to the 1983 and 1984 economic crisis.⁸¹ In line with the dominant policy prescriptions, a gradual introduction of freehold titles instead of communal tenure was expected to foster economic growth and promoted agricultural investment. As such, and following the policy prescriptions of the World Bank and the International Monetary Fund, the Lands Title Registration Act of 1986 provided a system of mandatory registration of title, which included the registration of a “customary law freehold,” defined as the

⁷⁹ James Fenske, "Land Tenure and Investment Incentives: Evidence from West Africa," *Journal of Development Economics* 95, no. 2 (2011): 138.

⁸⁰ The literature on the challenges of land registration is vast; see for example Ubink and Quan, "How to Combine Tradition and Modernity? Regulating Customary Land Management in Ghana."; Lorenzo Cotula, "Changes in 'Customary' Land Tenure Systems in Africa," (London: International Institute for Environment and Development, 2007). Kasanga and Kotey provide figures on deeds registration in Ghana between 1988 and 1998. Although outdated, these figures show that “in comparison with the rapid urban sprawl and residential developments, the number of title deeds registered is quite low... this suggests that almost all transaction remain unregistered.” (*Land Management in Ghana: Building on Tradition and Modernity*, 21).

⁸¹ Sara Berry, "Ancestral Property: Land, Politics and 'the Deeds of the Ancestors' in Ghana and Cote D'Ivoire," in *Contesting Land and Custom in Ghana. State, Chief and the Citizen*, ed. Janine Ubink and Kojo Sebastian Amanor (Leiden: Leiden University Press, 2008).

rights of user subject only to such restrictions or obligations as may be imposed upon a subject of a stool or a member of a family who has taken possession of land of which the stool or family is the allodial owner either without consideration or on payment of a nominal consideration in the exercise of a right under customary law to the free use of that land.⁸²

This new registration system “sought to achieve nothing less than the creation of individual freehold titles”⁸³ through the registration of customary titles, which were no longer described as “usufruct rights” but as “freeholds titles.”⁸⁴ The registration of customary freehold titles, as envisaged in the Act, would have entailed the extinction of the authority of chiefs over stool land.⁸⁵ As Shaw noted,

individual property rights would of course remove the land rights of the tribal chiefs, which, given the power of the chiefs in the Ashanti society, would be difficult to achieve.⁸⁶

Against this background, the political change brought about by the end of military rule and new democratic elections in 1992—which saw the incumbent President Rawlings re-elected—provided an opportunity for chiefs to react and influence again the land tenure system of the country through new constitutional provisions. As a consequence, in what has been defined a “*coup de grace*” struck by the chiefs,⁸⁷ the 1992 Constitution clearly reads that “no interest in, or right over, any stool land in Ghana shall be created which vests in any person or body of persons a freehold interest howsoever described.”⁸⁸ The new Constitution interrupted the process of individualization of land rights that had been envisaged by the Land Titles Act by reasserting the principle of inalienability of stool land. However, empirical research has shown that, as this Chapter will discuss, the alienation of land by chiefs happens through transactions that are not registered nor

⁸² Land Title Registration, 1986, Section 19.

⁸³ Daniel Appiah, “The Politics of Traditional-Federal State Formation and Land Administration Reform in Ghana: 1821-2010,” PhD Dissertation (University of York, 2012).

⁸⁴ See footnote no. 54.

⁸⁵ Woodman, *Customary Law in Ghanaian Courts*.

⁸⁶ Shaw, “The Integration of Multiple Layers of Land Ownership, Property Titles and Rights of the Ashanti People in Ghana,” 165.

⁸⁷ Appiah, “The Politics of Traditional-Federal State Formation and Land Administration Reform in Ghana: 1821-2010,” 201.

⁸⁸ Constitution of Ghana, 1992, Article 197.5.

supervised by government agencies. It is to be noted that the system of title registration is currently in force, although its application is still limited to the urban centers of Accra, Tema, and Kumasi.⁸⁹ The next Section will illustrate current trends in land administration and land policy.

The National Land Policy and the Land Administration Project

The 1999 National Land Policy issued by the Ministry of Forestry and Lands confirmed the principle of inalienability of stool land, although some internal contradictions exist.⁹⁰ The Land Policy represents the first attempt to provide a unitary framework for the scattered legislation concerning land tenure. The document aims to address the crucial land problems and namely the

general indiscipline in the land market, characterised by land encroachments, multiple land sales, use of unapproved development schemes, haphazard development, indeterminate boundaries of customary-owned, resulting from lack of reliable maps and plans, compulsory acquisition by government of large tracts of land, which have not been utilised; a weak land administration system and conflicting land uses, such as, the activities of mining companies, which leave large tracts of land denuded as against farming, which is the mainstay of the rural economy, and the time-consuming land litigation, which have crowded out other cases in our courts.⁹¹

Amongst the Guiding Principle of the Land Policy is the one that land is a “a common national or communal property resource held in trust for the people and which must be used in the long term interest of the people of Ghana.”⁹² At the same time, the Land Policy foresees “the principle of fair access to land and security of tenure”⁹³ and, when describing the titles that are to be secured, it includes “customary freehold” as well.

⁸⁹ Kasanga and Kotey, *Land Management in Ghana: Building on Tradition and Modernity*.

⁹⁰ The relation between State and traditional authorities has been critically analyzed by Ubink who refers to a “policy of non-interference” of the State in chieftaincy affairs – which can be traced back to the crucial role of chiefs in electoral politics in Ghana. According to the author, a negative consequence of this non-interference is the lack of checks and balances on traditional authorities, which may prove particularly problematic in land management (Ubink, “Traditional Authority Revisited: Popular Perceptions of Chiefs and Chieftaincy in Peri-Urban Kumasi, Ghana”).

⁹¹ Ministry of Forestry and Lands, *National Land Policy*, Accra, 1999, Foreword.

⁹² *Ibid.*, Section 3.1.

⁹³ *Ibid.*

However, in its glossary the Land Policy clarifies that the customary freehold equals usufruct, when it defines the latter as

rights in land held by a member of the land-holding community or a stranger, who has obtained an express grant from the land-holding community, using customary mode of alienation. *It is at times referred to as customary freehold, proprietary occupancy or determinable title.* [emphasis added]⁹⁴

The overlapping of concepts of customary freehold and usufruct in the Land Policy reflects the overall ambiguity concerning the inalienability of stool land, which will be discussed in the next Section.

In 2003, as part of the effort to implement the Land Policy, the Ghanaian Government launched its long-term Land Administration Project, which aims to streamline land administration, improve land registration and introduce new controls in customary land transactions through the institution of Customary Land Secretariats across the country. These entities are expected to connect the state and the customary system and contribute to the formalization of customary land titles.⁹⁵ The project is still ongoing and so far only a limited portion of Customary Land Secretariats (57)⁹⁶ have been created – the involvement of chiefs is crucial for the successful implementation but traditional authorities are reluctant to accept the creation of the Secretariats, which will inevitably reduce the chiefs' discretionary powers in land management.⁹⁷

Stool Land between Land Transactions and “Inalienability”

As mentioned above, the inalienability of stool land is sanctioned by the Constitution, which specifies that no freehold interest may be created on stool land. However, the

⁹⁴ *Ibid.*, Glossary.

⁹⁵ On the Land Administration Project, see: Ubink and Quan, "How to Combine Tradition and Modernity? Regulating Customary Land Management in Ghana"; Shaw, "The Integration of Multiple Layers of Land Ownership, Property Titles and Rights of the Ashanti People in Ghana".

⁹⁶ LandAC, "Food Security and Land Governance Factsheet: Ghana".

⁹⁷ Schoneveld and German, "Translating Legal Rights into Tenure Security: Lessons from the New Commercial Pressures on Land in Ghana".

legislative framework of the country is not entirely consistent with this overarching principle and empirical research has shown that alienation of customary land are common across the country, especially in areas where the demand for land is high.

In his analysis of Ghanaian agriculture from the 19th century on, Amanor identified in the expansion of cocoa farming the driving factor behind the alienations of stool land – in a process that the Author described as follows:

The cocoa frontier has led to the rapid alienation of land and has often created shortages of land for the youth and subsequent generations... With the development of land sales to cocoa farmers, chiefs began to define their alienable stool lands (that is the areas which they could transact with non-locals) as the areas within their domain, which were not occupied by the existing or autochthonous farming population. They began selling these lands to migrants to gain revenues from them. Since the local farming population had rights as citizens to farm freely, chiefs could only gain revenues by selling land to migrants or finding other ways of expropriating land from locals...The development of cocoa, thus, created new interests in land for chiefs that had not existed before. This essentially led to a redefinition of stool lands as lands that could be transacted by the stool under conditions of expanded commodity production, export agriculture, and integration into world commodity markets.⁹⁸

In his view, the expansion of export agriculture contributed to the alienation of stool land as it provided a revenue opportunity to chiefs in their role of custodians of land.

In relation to contemporary Ghana and to peri-urban areas, which in the context of rapid urbanization of the country are becoming more and more valuable for urban development, a similar tendency of chiefs to alienate land has been identified. As Ubink and Quan noted,

although the Constitution prohibits the sale of customary land and only allows leases, nearly everyone speaks of the ‘selling’ of land and many people, ‘sellers’ as well as ‘buyers’, seem to regard land allocations for residential purposes as definitive transfers.⁹⁹

In line with these findings, many authors showed that customary systems respond to changes; in particular, Kasanga and Kotey argued that

⁹⁸ Amanor, "The Changing Face of Customary Land Tenure," 69-70.

⁹⁹ Ubink and Quan, "How to Combine Tradition and Modernity? Regulating Customary Land Management in Ghana," 199.

customary land tenure institutions have evolved towards individualized ownership.... The evidence also indicated that increasing scarcity of land has led to the development of land transactions through markets.¹⁰⁰

These authors also confirm that the alienations of land are becoming permanent, and as such it no longer correspond to the usufruct rights traditionally foreseen in the country.¹⁰¹ Moreover, land alienations often involve areas that are already subject to usufruct rights, but that the chiefs allocate to increase their revenue stream from stool land.¹⁰² It is important to note that customary law is not static, but it evolves over time and adapts to changes in the social and economic context.¹⁰³ The increased influx of foreign investment in agriculture contributes to re-defining land tenure in the country: as the field research has shown, chiefs alienate land as owners would do, generally without the payment of any compensation to existing landholders, and they are able to appropriate a considerable part of the revenue derived from these transactions.

III. Large-scale Agricultural Investments in Ghana

As mentioned in the Introduction, starting from 2005 and 2006 Ghana witnessed an increase in the number of foreign investors interested in acquiring control over large tracks of land in the country. An overall increase in the flow of foreign direct investment was reported in the period 2003-2009, although only 5 percent of the projects concern agriculture.¹⁰⁴ In 2013 Schoneveld reported that since 2005 more than two million hectares of agricultural land were alienated to investors, approximately 90

¹⁰⁰ Kasanga and Kotey, *Land Management in Ghana: Building on Tradition and Modernity*.

¹⁰¹ *Ibid.*

¹⁰² Ubink and Quan, "How to Combine Tradition and Modernity? Regulating Customary Land Management in Ghana".

¹⁰³ This aspect has been discussed in Chapter 1. On the dynamism of customary law, see: Kasanga and Kotey, *Land Management in Ghana: Building on Tradition and Modernity*.

¹⁰⁴ Food and Agriculture Organisation, "Trends and Impacts of Foreign Investment in Developing Country Agriculture: Evidence from Case Studies," (Rome: Food and Agriculture Organisation, 2012). See also UNCTAD, Foreign Direct Investment Data.

percent of which were of foreign origin.¹⁰⁵ Overall the available figures on large-scale land investments are not consistent but all the reports emphasized that the production of biofuel was one of the key drivers of land investments in the country.¹⁰⁶ In this sense, Schoneveld noted that about 1.2 million hectares have been acquired in Ghana for biofuel production, of which the majority aimed at cultivating *Jatropha*.¹⁰⁷

The importance of bio-fuel production in recent land investments has been confirmed in the field research through the input of GIPC. Differently from its Zambian counterpart, ZDA, GIPC did not disclose any documents during the research concerning the value of registered agricultural investments. This may partly be explained by the fact that, as already mentioned, GIPC does not have an official registry of all the land acquisitions that take place across the country.

The only data obtained from GIPC was a list of all the companies who, starting from 2005, registered an agricultural investment in the country. This list, which contains 110 entries and was last updated in October 2014, encompasses more than 15 companies who registered for bio-fuels production. As one of the investment officers at GIPC confirmed, “around 2008 and 2009, so many investors were coming to Ghana just to go in *jatropha* cultivation, they wanted to acquire large parts of land for that.”¹⁰⁸ In

¹⁰⁵ George Schoneveld, *The Governance of Large-Scale Farmland Investments in Sub-Saharan Africa: A Comparative Analysis of the Challenges for Sustainability* (Delft: Eburon Books, 2013). The prominence of foreign investors was confirmed by the informants in the interviews.

¹⁰⁶ Action Aid, "Land Grabbing, Biofuel Investment and Traditional Authorities in Ghana: Policy Brief," (Action Aid, 2012); George Schoneveld, Laura German, and Eric Nutakor, "Land-Based Investments for Rural Development? A Grounded Analysis of the Local Impacts of Biofuel Feedstock Plantations in Ghana," *Ecology and Society* 16, no. 4 (2011); Sonja Vermeulen and Lorenzo Cotula, "Over the Heads of Local People: Consultation, Consent, and Recompense in Large-Scale Land Deals for Biofuels Projects in Africa," *The Journal of Peasant Studies* 37, no. 4 (2010).

¹⁰⁷ George Schoneveld, "The Anatomy of Large-Scale Farmland Acquisitions in Sub-Saharan Africa," in *CIFOR Working Papers* (Bogor: Center for International Forestry Research, 2011). Boamah as well emphasized that “most of these recent land deals have involved the cultivation of *jatropha* for the production of liquid biofuels” (Festus Boamah, "Imageries of the Contested Concepts “Land Grabbing” and “Land Transactions”: Implications for Biofuels Investments in Ghana," *Geoforum* 54 (2014): 324.

¹⁰⁸ Ghana Investment Promotion Center, Investment Promotion Officer, interview no. 4, Accra, 17 November 2014.

years where the oil price had risen, this crop seemed to promise good yields whilst also being suitable for cultivation in marginal lands.¹⁰⁹ The interest in jatropha reportedly drove many land acquisitions in Ashanti and Brong-Ahafo region,¹¹⁰ but its success was not always as anticipated. Some of the companies operating in this sector stopped their operations or reconverted their production to maize, soybeans and other crops, as documented in the field research.¹¹¹

The agricultural sector constitutes approximately 20 percent of Ghana's GDP¹¹² but it employs more than 40 percent of the population,¹¹³ which justifies why agriculture is often defined as "the backbone" of the country.¹¹⁴ It is to be noted that the expansion of agriculture has been encouraged by the Government of Ghana since independence, although with an emphasis mostly on small-scale agriculture, which still constitutes the bulk of both agricultural output (80 percent) as well landholding (90 percent).¹¹⁵ The presence of large-scale plantations in the country has historically been limited. As German and others recall, after 1957 the Government led initiatives to develop large-scale agriculture and plantations through the use of a state-owned

¹⁰⁹ On jatropha in Africa, see: Janske van Eijck, Edward Smeets, and André Faaij, "Jatropha: A Promising Crop for Africa's Biofuel Production?," in *Bionergy for Sustainable Development in Africa*, ed. Rainer Janssen and Dominik Rutz (Dordrecht: Springer, 2011).

¹¹⁰ Boamah, "Imageries of the Contested Concepts "Land Grabbing" and "Land Transactions": Implications for Biofuels Investments in Ghana."; Aid, "Land Grabbing, Biofuel Investment and Traditional Authorities in Ghana: Policy Brief".

¹¹¹ This aspect will be discussed in the next Section with evidence from field research.

¹¹² Agriculture, value added (% of GDP), World Development Indicators 2017, <http://data.worldbank.org/indicator/NV.AGR.TOTL.ZS?locations=GH>. Accessed 1 December 2017.

¹¹³ Employment in Agriculture (% of total employment), World Development Indicators 2017, <http://data.worldbank.org/indicator/SL.AGR.EMPL.ZS?locations=GH>. Accessed 1 December 2017. It is to be noted that until 2005 this percentage was 59.3 percent.

¹¹⁴ See for example: Ahwoi, "Government's Role in Attracting Viable Agricultural Investment: Experiences from Ghana."

¹¹⁵ Schoneveld, German, and Nutakor, "Land-Based Investments for Rural Development? A Grounded Analysis of the Local Impacts of Biofuel Feedstock Plantations in Ghana".

corporation and state farms, which were later dismantled in the period following structural adjustments in the 1980s.¹¹⁶

The market-oriented reforms that were initiated by structural adjustments primarily aimed at promoting trade and liberalizations. In this context, the Ghana Investment Promotion Center (GIPC) was created in 1994 with the objective to

create an enhanced, transparent and responsive environment for investment and the development of the Ghanaian economy through investment and encourage, promote, and facilitate investment in the country.¹¹⁷

GIPC, like the other investment promotion agencies created across the world in the same years, is the entry door for both foreign and domestic investors, who through the registration at GIPC gain access to the available “incentives.” Only one year later in 1995, another important entity called the Ghana Free Zones Board (GFZB) was created in order to promote investments, with particular emphasis on ones with an export-oriented focus.¹¹⁸ The GFZB is responsible for providing assistance to, and the licensing of investors active in export-oriented productions, which benefit from specific incentives provided by the Government.

The promotion of foreign investments through fiscal incentives is common in an economic context in which countries compete to attract foreign capital and currency. In Ghana, the Government provides significant tax holidays to foreign investors, to the extent that the World Bank noted “far-reaching tax breaks imply that even profitable companies will pay almost no taxes, reducing the ability and incentive of local

¹¹⁶ Schoneveld and German, "Translating Legal Rights into Tenure Security: Lessons from the New Commercial Pressures on Land in Ghana." The state support to large-scale agriculture was “along the entire value chain” in the period from 1957 to 1966, when Nkrumah’s presidency was overturned (Ahwoi, "Government’s Role in Attracting Viable Agricultural Investment: Experiences from Ghana".

¹¹⁷ Ghana Investment Promotion Center Act, 1994, Section 3.

¹¹⁸ Free Zones Act, 1995.

governments to provide complementary public goods.”¹¹⁹ Moreover, the same report argued that

another drawback of incentives may be to attract projects that are not economically sound as many investors engaged in land-extensive projects indicate that subsidies and incentives play a major role in ensuring the viability of their ventures.¹²⁰

Investors are required to register with GIPC and indicate the type of activity as well as the capital invested, for which a minimum threshold is required in each productive sector.¹²¹ For the agricultural sector, investors may benefit from the following fiscal advantages: income tax exemption for 10 years in tree cropping and cattle ranching, 5 years in agro-processing, and 5 years in fish farming, poultry and cash crops. Moreover, the import of agricultural machinery is exempt from import-duty inasmuch as its function may be proved to be exclusively agricultural.¹²² Investors registered with GFZB benefit from a different set of incentives: this include the exemption of all duties on production-oriented imports and exports from the free zones, income tax exemption for 10 years, and income tax not exceeding 8 percent after the tax-holiday period.¹²³

The potential for agricultural expansion is estimated by the Government of Ghana to be significant: in 2010 the then Minister of Agriculture estimated that less than 55 percent of arable land in the country is currently under cultivation.¹²⁴ In an

¹¹⁹ Klaus Deininger and Derek Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?* (Washington, DC: World Bank, 2011), 113.

¹²⁰ *Ibid.*, 116.

¹²¹ Ghana Investment Promotion Center Act, 1994.

¹²² *Ibid.* See also the website of GIPC: www.gipcghana.com. Accessed 1 December 2017.

¹²³ Free Zones Act, 1995.

¹²⁴ Kwesi Ahwoi, "Government's Role in Attracting Viable Agricultural Investment: Experiences from Ghana," paper presented at the 2010 *World Bank Land and Poverty Conference* (Washington D.C., 2010). The availability of land is often contested in the literature. For example, Cotula writes "Global statistical databases and satellite imagery suggest that land is underutilized in some African countries. Even setting aside forests and protected areas, there is much potential for more intensive use of the land. But global studies tend to overestimate the extent of this potential. Some data goes back to the mid-1990s and do not fully factor in intervening changes such as land degradation. More importantly, satellite-based studies underestimate the land areas used by shifting cultivators and pastoralists. If a piece of land is left fallow, satellite imagery would not reveal much evidence of current use. Yet, in much of Africa fallow and grazing play a crucial role in local land use systems and livelihood

effort to foster agricultural development, in 2012 the Government of Ghana has launched the Ghana Commercial Agriculture Project (GCAP), jointly financed by the United States Aid agency (USAID) and the World Bank, which aims to foster commercial agriculture in the country by increasing access to land, finance, and markets. In its framework, and in order to make land more easily available to investors, a Land Bank Directory has been created. The Land Bank is a repository of land managed by the Ministry of Lands, Forestry and Mines and it indicates land that can be readily made available for commercial agriculture – and on which no competing claims have been found. The contribution of chiefs, who have signaled the availability of land in their traditional areas, has made the creation of such a repository possible.¹²⁵ The Land Bank is, however, still in its initial phase and its effectiveness has not yet been analyzed. In the field research, none of the investment studied used land from the GIPC repository and GIPC officials clarified that “we don’t have yet land available for large-scale projects like the ones we see with our companies.”¹²⁶

Until the objectives of the Land Bank are achieved, the only way for investors to access land in Ghana is by obtaining a lease from traditional authorities. Theoretically speaking, investors might access public land by leasing it, but in practice this does not appear to be the case: public land constitutes only 20 percent of land in the country and simply put, “there is no public land available for investments, but stool land is available everywhere in Ghana.”¹²⁷ The field research confirmed that investments take place on stool land, which is generally identified by investors through the help of middlemen.

strategies.” (Lorenzo Cotula, *The Great African Land Grab?: Agricultural Investments and the Global Food System* (London: Zed Books, 2013), 84-85.

¹²⁵ Akwensivie, "Towards Win-Win Outcomes from Large-Scale Land-Based Investments in Ghana".

¹²⁶ Ghana Investment Promotion Center, Investment Promotion Officer, interview no. 4, Accra, 17 November 2014.

¹²⁷ *Ibid.*

Access to Land for Investors: Between State and Customary Law

Investors interested in the use of land in the country may not purchase it, due to the constitutional provisions that prevent the alienation of land. As such, they are required to acquire leasehold titles over land through a process that is at the intersection between customary law and state law. The requirements of state law start with the registration of the investor at GIPC, which enables the investor to take advantage of the available incentives. In order to register, the opening of two bank accounts is required, one in local currency and one in US dollars.¹²⁸ GIPC is mandated to support investors and assist them with administrative and fiscal requirements. After the registration, the investor is licensed to legally operate in the country and it may start negotiating land with the competent traditional authority.

If the nature and scale of the project so requires, an environmental permit need to be obtained from the Environmental Protection Agency.¹²⁹ The permit is always required when the agricultural investment involves the clearing of more than 40 hectares of land or the clearing of “land located in an environmentally sensitive area.”¹³⁰ Before its issue, “consultation with members of the public likely to be affected by the operations of the undertaking” is required.¹³¹ Once the environmental assessment procedure is completed and the permit is issued, or even before that, the investor and paramount chief, with the agreement of the traditional council, may sign the lease contract. Foreign companies may not obtain leasehold titles exceeding 50 years, as foreseen by the Constitution,¹³² whereas for national actors the duration of the lease may be up to 99 years. The lease contract shall then be registered with the Lands

¹²⁸ *Ibid.* Minimum capital requirements are foreseen in each economic sector.

¹²⁹ Environmental Protection Act, 1994, and Environmental Assessment Regulations, 1999.

¹³⁰ Environmental Assessment Regulations, 1999, Schedule 1.

¹³¹ *Ibid.*, Section 12.

¹³² Constitution of Ghana, 1992, Article 266.5.

Commission. After the registration, the investor's right to use the land is fully protected and may be enforced in Court in case of litigation. Moreover, from the moment of registration the rent is due and collected by the Office of the Administrator of Stool Land. It will be this Office that distribute the revenues according to the percentages set in the Constitution, and therefore keep 10 percent to cover its expenses and allocate the rest to the Stool, the traditional authority, and the District Assembly.

Customary law also regulates the way in which this process is carried out. The next Section will provide more details on this, based on the evidence from the field research. To contact the chief, in line with local customs, investors are required to bring offers in the form of drinks accompanied by money. The presence of a community member or Ghanaian national is necessary to facilitate the process and ensures mutual trust between the parties. Once the paramount chief agrees in principle on leasing stool land to the investor, he directs the latter to divisional and sub-divisional chiefs who will in turn ensure access to the sites in order to inspect and verify them. In this phase, the community is generally not involved and do not engage directly with the investor. After identification and survey of the land, the investor is required to make an upfront payment to the chief, also called "drink money", to ensure that land will be made available to him. This payment, which is based on the size of land acquired, is not recorded in the lease contract but is considered by chiefs as part of their prerogatives. After payment and signing of the contract, the investor is free to register the contract with the Lands Commission. In this phase, competing claims may arise – as some of the usufruct holders may oppose the alienation of land. These aspects will be discussed in more detail in the following sections.

The Areas Analyzed

This study focused on three rural districts in the Ashanti and Brong-Ahafo regions: Asante Akin North, Atebubu-Amantin, and Pru, which are shown in the illustration below. In these districts, the presence of large-scale land investments had been highlighted in the literature¹³³ and also confirmed during the field research by key informants based in the capital, Accra.¹³⁴

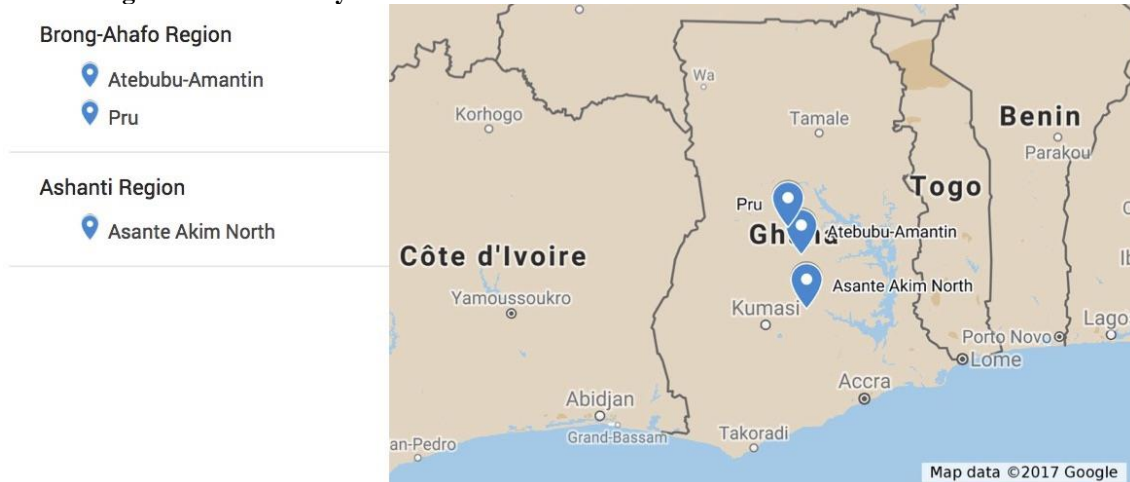
In the Akin North district, the Agogo traditional council had engaged in several negotiations with investors over the use of land for agricultural purposes. The main investor in the area is a Norwegian company who obtained a lease for about 13 thousand hectares within the Agogo traditional area. The company approached the traditional council in 2007 and initially requested 20 thousand hectares to be used for jatropha cultivation. However, as this Section will discuss, the size was later reduced to 13 thousand hectares. At the time of the field visit, the farm was already operational but on a much-reduced portion of land, only 700 hectares, and the company expressed the intention to expand gradually its operations on the remaining available land, which was already part of the lease contract, for which the registration process was allegedly ongoing.¹³⁵

¹³³ See for example: Schoneveld, German, and Nutakor, "Land-Based Investments for Rural Development? A Grounded Analysis of the Local Impacts of Biofuel Feedstock Plantations in Ghana."; Boamah, "Imageries of the Contested Concepts "Land Grabbing" and "Land Transactions": Implications for Biofuels Investments in Ghana."; Akwensivie, "Towards Win-Win Outcomes from Large-Scale Land-Based Investments in Ghana."; Schoneveld and German, "Translating Legal Rights into Tenure Security: Lessons from the New Commercial Pressures on Land in Ghana".

¹³⁴ Civil society representative, interview no. 1, Accra, 10 November 2014; Office of the Administrator of Stool Lands, Ministry of Lands and Natural Resources, Officer, interview no. 2, Accra, 12 November 2014; Ghana Investment Promotion Center, Investment Promotion Officer, interview no. 4, Accra, 17 November 2014; Government of Ghana, Communication Officer, interview no. 5, Accra, 19 November 2014; Agribusiness Support Division, Ministry of Food and Agriculture, Head of Division, interview no. 6, Accra, 19 November 2014.

¹³⁵ Company A, Chief Operations Officer, interview no. 13, Kumasi, 1 December 2014.

Fig. 6: Districts Analyzed in the Research



Source: Author's elaboration based on Google data

In addition to this large-scale lease, the Agogo traditional council partially disclosed documents concerning the lease to an American firm,¹³⁶ whose presence in the area is also reported by the Land Matrix database.¹³⁷ Only limited information was made available on this company who, according to the explanation provided by the traditional council, leased 10 thousand hectares in the area for unspecified agricultural production, but did yet not register the lease with the Lands Commission. Both these companies are regularly registered with GIPC.

The analysis of documents provided by the Agogo traditional council indicated the presence of interest in land from other investors: one a Chinese company and another of undeclared origin, both for which lease contracts had already been drafted but not signed. Both these draft contracts foresaw the allocation of more than 10 thousand hectares of land in the area of Agogo.

¹³⁶ Agogo Traditional Council, Divisional Chief and Registrar, interview no. 14, Agogo, 2 December 2014; Agogo Traditional Council, Divisional Chief and Registrar, interview no. 18, Agogo, 4 December 2014; Agogo Traditional Council, Registrar, interview no. 27, Agogo, 15 December 2014.

¹³⁷ www.landmatrix.org. Accessed 1 December 2017.

Fig. 7: A village neighbouring the investment location in the Asante Akim North District



Source: Author's picture

In the Atebubu-Amantin district, the second rural area visited, one large-scale investment was already operational. In 2012 a Norwegian company had initiated a project of tree plantation for the production of biomass, following the lease of about 30 thousand hectares between the traditional areas of Atebubu and Wiase. At the time of the field visit, the lease obtained by the company was undergoing registration at the Lands Commission, as confirmed in the interviews.¹³⁸ The traditional council did not disclose the lease contract but it clarified that the duration of the lease was for 50 years on land that was previously in use for shifting cultivation. The participants in the research in Atebubu also reported the interest of another company in starting jatropha plantation,¹³⁹ but the traditional council clarified that the lease contract had not been

¹³⁸ Lands Commission, Officer, interview no. 21, Nsyuta, 8 December 2014; Company C, Community Liason Officer, interview no. 23, Bantema 10 December 2014; Atebubu Traditional Council, Registrar, interview no. 24, Atebubu, 10 December 2014; Atebubu District Assembly, Officer, interview no. 26, 11 December 2014.

¹³⁹ Ministry of Food and Agriculture, District Officer, interview no. 25, Atebubu, 11 December 2014; Atebubu District Assembly, Officer, interview no. 26, 11 December 2014.

signed yet and that discussions over the land to be leased were still open with the company.

In the traditional area of Yeji, in the Pru District, the investors' interest in bio-fuel production was clear, based on the presence of two companies operating in jatropha and biodiesel cultivation. An Italian and a Canadian investor had leased land in the area, 6 thousand and 22 thousand hectares respectively. At the time of the field visit, only a small portion of the land was already in use and one of the two companies had started to dismantle its operations. One of those contracts was particularly problematic, as this Section will discuss, because the investment became a point of contestation between two competing paramount chiefs, who both claimed authority of the area. Only the Pru District Assembly partially disclosed documents on these two investments, and it was not clear whether the registration process at the Lands Commission had already been initiated, due to the contestation of the land transaction between the two chiefs.

When the field visits were conducted, the investments analyzed were all still at a very early stage of implementation. An assessment of their impact was beyond the scope of this work, which instead focuses on the processes regulating and facilitating investments.

Approaching the Chiefs: Middlemen and "Drinks"

In all the cases analyzed, the companies interested in land approached the chiefs through locals, who helped them understand customs and address their requests to the chiefs in the appropriate manner. The institution of chieftaincy is extremely important across the country and especially in rural areas where the role of chiefs as leaders of the community and land managers is well respected.

Fig. 8: A paramount chief in his office



Source: Author's picture

One of the founders of the Norwegian company mentioned earlier was a native of Agogo, and therefore he contacted the chief directly and negotiated the use of land in the area without the need of intermediaries. Contrary to this, in Atebubu and Yeji, the companies approached chiefs through middlemen who arranged meetings and ensured that local customs were respected. In particular, all the members of traditional councils interviewed insisted on the mandatory offer of “drinks” to ensure that homage was paid to the chief and respect was shown for his authority.¹⁴⁰ In the interviews some respondents suggested that “drinks” should be accompanied by “drink money,” i.e., an offer of money that shows respect for the Stool.¹⁴¹ As clearly illustrated by one of the paramount chiefs interviewed:

¹⁴⁰ Atebubu Traditional Council, Divisional chief, interview no. 22, Atebubu, 9 December 2014; Yeji Traditional Council, Paramount Chief and Divisional Chiefs, Yeji, interview no. 30, 18 December 2014.

¹⁴¹ Nsuta Traditional Council, Paramount Chief, interview no. 12, Nsuta, 29 November 2014; Agogo Traditional Council, Divisional Chief and Registrar, interview no. 14, Agogo, 2 December 2014; Atebubu Traditional Council, Divisional chief, interview no. 22, Atebubu, 9 December 2014; Weise Traditional Council, Paramount Chief, Weise, interview no. 32, 22 December 2014; Agogo Traditional Council, Paramount Chief, Accra, interview no. 33, 30 December 2014.

According to the tradition, you bring 1 or 2 schnapps¹⁴² and then you add some money to the schnapps before coming to see me. If you don't know how much to bring, the registrar will tell you, but you can always bring more money!¹⁴³

Amongst the advantages of having a middleman, as one of the company officers interviewed explained, is the fact that payments to the chief could be better accounted for through a lump-sum payment made to a consultant or middleman:

If you have a middleman, he charges you a fee and then he knows how to deal with the chiefs. To be honest with you, I would not know how to deal with them on my own and what to do. Also, if you have a consultant or a middleman, his fee will include *everything* and that it will be easier for the purpose of accountability [emphasis added].¹⁴⁴

It is worthwhile mentioning that GIPC and GFZB did not play any role as intermediaries in the investments studied. Notwithstanding their mandate to support investors, and as confirmed during the interviews,¹⁴⁵ these statutory bodies did not participate in the negotiations over land leases – as is also confirmed in the literature.¹⁴⁶ This lack of involvement appears in line with the “policy of non-interference” in chieftaincy affairs that the Ghanaian government has historically adopted.¹⁴⁷ However, GIPC advises investors on the challenges of leasing stool land, and generally recommends a close consultation with the competent Lands Commission to ensure that litigation on land is avoided. As noted by an investment officer, the existence of competing claims over land may pose problems when the leases cover large areas:

It is hard to acquire such large land as it takes time before you acquire that land at a go, unless you acquire that at bits, some few thousands here and there. It is hard because there were already people using the land for their farming activities and because you paid so much to the chief, and the chief might try to use his

¹⁴² Schnapps is imported liquor offered to chiefs for libations.

¹⁴³ Nsuta Traditional Council, Paramount Chief, interview no. 12, Nsuta, 29 November 2014.

¹⁴⁴ Company A, Chief Operations Officer, interview no. 13, Kumasi, 1 December 2014.

¹⁴⁵ Ghana Investment Promotion Center, Investment Promotion Officer, interview nr. 4, Accra, 17 November 2014; Company A, Chief Operations Officer, interview nr. 13, Kumasi, 1 December 2014; Company B, Chief of Operations, interview nr. 17, Agogo, 3 December 2014; Company C, Community Liaison Officer, interview nr. 23, Bantema 10 December 2014.

¹⁴⁶ Akwensivie, "Towards Win-Win Outcomes from Large-Scale Land-Based Investments in Ghana;" German, Schoneveld, and Mwangi, "Contemporary Processes of Large-Scale Land Acquisition in Sub-Saharan Africa: Legal Deficiency or Elite Capture of the Rule of Law?"

¹⁴⁷ Ubink and Amanor, *Contested Land and Custom in Ghana. State, Chiefs and the Citizen*.

influence to drag them out of the land. Also, others might have secured their land title through registration, in a way that even the chief may not be aware of.¹⁴⁸

The Involvement of Local Communities

It is important to note that, notwithstanding official data concerning land availability in Ghana,¹⁴⁹ most of the participants in the research emphasized that the land leased to investors was already in use when the lease was obtained. As a representative of a company stated, “it was clear, when you went on the land, that there were activities there.”¹⁵⁰ Moreover, shifting cultivation is common in the country and as such fallow lands are part and parcel of small-scale agricultural practices: the paramount chief of Atebubu explained clearly that “lands are being used but we do shifting cultivation, so because of this we have a lot of land that for some time lays there without being used.”¹⁵¹ However, according to customary law, a chief may alienate land on which usufruct rights exist when this is in the interest of the community. In such cases, the chief is expected to allocate an alternative parcel of land to the previous usufruct holder.¹⁵²

Customary law does not prescribe consultations with the local community before the lease of stool land. The chief, together with the traditional council, represents the interest of the community and as such he is entitled to allocate land. As an official of the Ministry of Agriculture clearly explained:

Some will not like it, but since land is in the hands of the chief, at the end of the day he is the one who decides and nobody else has a say on it!¹⁵³

¹⁴⁸ Ghana Investment Promotion Center, Investment Promotion Officer, interview no. 4, Accra, 17 November 2014.

¹⁴⁹ Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*; Ahwoi, "Government's Role in Attracting Viable Agricultural Investment: Experiences from Ghana".

¹⁵⁰ Company A, Chief Operations Officer, interview no. 13, Kumasi, 1 December 2014.

¹⁵¹ Atebubu Traditional Council, Divisional chief, interview no. 22, Atebubu, 9 December 2014.

¹⁵² See the discussion in Section II.

¹⁵³ Ministry of Food and Agriculture, District Officer, interview no. 25, Atebubu, 11 December 2014.

However, the statutory laws applicable to land investments prescribe two types of involvement of the local community. First, before the project receives the environmental permit, a “consultation with members of the public likely to be affected by the operations”¹⁵⁴ is mandatory. Second, before land titles are registered at the Lands Commission, the District Assembly shall ensure the publication of this information in the District. This practice allows individuals that hold competing claims to oppose the land registration. This opposition would activate a procedure managed by the Lands Commission, which aims to prevent litigation by clarifying who the rightful titleholder is. It is to be noted that about 60 percent of litigation in Ghana is constituted by land disputes¹⁵⁵ and the insecurity of titles is one of the key problems of land administration in the country.¹⁵⁶

As emerged in the field research, large-scale land investments, in practice, first entail the signing of a lease contract between the chief and the investor, and only afterwards does the environmental impact assessment procedure commence.¹⁵⁷ Based on the needs of the investors, divisional chiefs identify the land and no involvement of the community is usually foreseen at this stage. As such, when the environmental impact assessment is conducted, the land has already been surveyed and no opportunity for input has been given to the community.

Moreover, the process of registration with the Lands Commission is long and entails several administrative steps, so that the potential involvement of the community through the notice publication is not effective to ensure a timely consultation. The

¹⁵⁴ Environmental Assessment Regulations 1999, Section 12.

¹⁵⁵ Kasanga and Kotey, *Land Management in Ghana: Building on Tradition and Modernity*.

¹⁵⁶ National Land Policy, 1999.

¹⁵⁷ Company B, Chief of Operations, interview no. 17, Agogo, 3 December 2014; Yeji Traditional Council, Paramount Chief and Divisional Chiefs, Yeji, interview no. 30, 18 December 2014; Office of the Administrator of Stool Lands, Stool lands officer, interview no. 20, Nsyuta, 8 December 2014. This practice has been confirmed in the literature; see for example: Agriculture, "Ghana Commercial Agriculture Project: Recommendations for Large-Scale Land-Based Investment in Ghana."; Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*.

investments that were analyzed, whose operations had already started, were not yet registered at the Lands Commission. For the company based in Agogo, the start of the registration procedure brought to light the fact that approximately 7 thousand hectares of land did not belong to the stool, but instead to families who opposed the registration. These families put pressure on the traditional council, who eventually agreed with the investor to reduce the lease to 13 thousand hectares. When opposition from the affected families surfaced, the company had already started its operation and, as the company representative pointed out, the withdrawal of the contested area was necessary to restore “operational peace.”¹⁵⁸

The investors who participated in the research described the process of registration as a “protection” against both trespassers and chiefs, as it prevents the latter from alienating the same land to other companies or individuals. In line with this, chiefs showed reluctance towards the process of land registration, which subtracts land revenues from their control and enables the Office of the Administrator of Stool Land to collect and share them according to the constitutional formula. As one of the paramount chiefs clearly mentioned, “if I don’t have the papers registered, then I am more protected, because I can take back the land if needed and the investors cannot trick me.”¹⁵⁹ The backlog and delays in the registration of large-scale land investments have been analyzed in the literature and other studies have pointed out that the majority of them are not registered¹⁶⁰ – which contributes to the inconsistency of the datasets available on land investments in the country.

¹⁵⁸ Company A, Chief Operations Officer, interview no. 13, Kumasi, 1 December 2014.

¹⁵⁹ Nsuta Traditional Council, Paramount Chief, interview no. 12, Nsuta, 29 November 2014.

¹⁶⁰ See for example: Akwensivie, “Towards Win-Win Outcomes from Large-Scale Land-Based Investments in Ghana”; Schoneveld and German, “Translating Legal Rights into Tenure Security: Lessons from the New Commercial Pressures on Land in Ghana”.

In light of the practice described above, the field research highlighted the fact that local communities were not sufficiently involved in the decision-making process over stool land. Moreover, other studies have argued that investors do not always conduct the mandatory environmental impact assessments,¹⁶¹ and as such—in addition to the environmental threat that this practice poses—no consultation with the affected communities takes place.

In addition to the lack of consultation, farmers affected by the investments lamented in the focus groups discussions that they had not been informed of the upcoming change in land use and of the lease contract. A farmer claimed that

when we were working there we realized that machines were brought on the land. We asked what was happening and why the machines were on our land and [Company A] told us that the Agogo chief gave them the land.¹⁶²

Some farmers reported that bulldozers clearing the land destroyed their crops.¹⁶³ Others claimed that they were evicted from their land without any prior notice.¹⁶⁴ Only in one of the cases analyzed was evidence of compensation for the land loss found. In Agogo, due to the pressure of the local community and with support from civil society organizations, did some farmers who lost access to the land receive a monetary compensation from the company.¹⁶⁵

Drink Money or Goodwill Payments

As already mentioned above, many studies have reported that the allocation of stool land is done by chiefs in exchange for the payment of “drink money” before the signing

¹⁶¹ Akwensivie, "Towards Win-Win Outcomes from Large-Scale Land-Based Investments in Ghana".

¹⁶² Community Members, Focus Group Discussion 1, Dukusen, 4 December 2014.

¹⁶³ Community Members, Focus Group Discussion 1, Dukusen, 4 December 2014, Community Members, Focus Group Discussion 3, Lailai, 12 December 2014.

¹⁶⁴ Community Members, Focus Group Discussion 2, Lailai, 12 December 2014.

¹⁶⁵ Community Members, Focus Group Discussion 1, Dukusen, 4 December 2014; Company A, Chief Operations Officer, interview no. 13, Kumasi, 1 December 2014; Agogo Traditional Council, Divisional Chief and Registrar, interview no. 14, Agogo, 2 December 2014.

of a contract.¹⁶⁶ During field research these payments have been confirmed by all the actors interviewed, who also referred to it as a “goodwill payment.” In the traditional areas of Atebubu and Wiase, the chiefs referred to the fact that investors would contribute to the expenses of building a new “palace,” i.e., the residence for the paramount chief. In Agogo, the traditional council provided access to documents, including receipts of payments, which showed that approximately 100 Dollars (USD) per hectare were requested as a lump-sum payment in order for the land lease to be granted.

The companies that participated in the research clarified that the competitive price of the land was one of the key factors for their decision to start operating in the area.¹⁶⁷ However, it is to be noted that each lease contract foresees the payment of an annual rent which, for the contracts that were disclosed, was 6 Cedis per year, corresponding to about 1.10 Euro. The payment of this rent is made directly to the chiefs until the lease is registered, after which the Office of the Administrator of Stool Land starts collecting it. Finally, the administrative fees for the land registration are to be paid directly to the Lands Commission with the amount dependent on the size of the land being leased.

Double Alienations and Other Problems with the Investments

Notwithstanding the competitive prices of stool land, investments in rural areas of the country may pose significant challenges to foreign actors. As reported in the literature,

¹⁶⁶ Lorenzo Cotula, "Land Deals in Africa: What Is in the Contracts?," (London: International Institute for Environment and Development 2011); German, Schoneveld, and Mwangi, "Contemporary Processes of Large-Scale Land Acquisition in Sub-Saharan Africa: Legal Deficiency or Elite Capture of the Rule of Law?"; Jhon Bugri, "Final Report on Agricultural Investments in Ghana: Evidence from Two Case Studies," (Rome: Food and Agriculture Organisation, 2012).

¹⁶⁷ Company A, Chief Operations Officer, interview no. 13, Kumasi, 1 December 2014; Company B, Chief of Operations, interview no. 17, Agogo, 3 December 2014.

in some cases the chiefs proceed to leasing the same parcel of land to more than one company or other individuals, or alienate land that does not belong to the Stool.¹⁶⁸ This maximizes the profits for the chiefs in the short term, but gives rise to litigation and may cause investments to stall or fail. As mentioned above, one of the companies that participated in the research experienced a similar problem. After signing the lease contract for more than 20 thousand hectares of land, for which the “drink money” had already been paid, it found competing claims over parts of the land, which the company decided to release to ensure “operational peace.”

In the Pru district, a different problem emerged in relation to the Italian large-scale investment in jatropha. The company negotiated access to land with one of the divisional chiefs without being aware of the long-standing dispute between him and the paramount chief of the traditional area. In 2008 the divisional chief released land to the investor, who started its pilot project before signing of the lease contract. At a later stage, the signing of this contract posed problems and was contested by the chiefs involved: according to statutory law, the lease contract had to be signed by the paramount chief as well as the divisional chief. The dispute between the two stalled the signing of the contract and created tension between the communities involved, who have come to oppose the project and threatened its operations with violence. The company was forced to adopt strict security measures and the restoring of operational peace required the mediation of district authorities, which ultimately severely delayed project implementation.¹⁶⁹

¹⁶⁸ The World Bank notes that this is a common practice in many countries in sub-Saharan Africa: “In many countries, maps to identify land allocations are either unavailable or inaccurate. The limited ability to cross-check land allocations enables local chiefs or other people with privileged access to records to “sell” the same plot several times to different parties or to renege on earlier contracts—practices found in Ghana, Indonesia, and Liberia, for example” (Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*, 113.)

¹⁶⁹ Unpublished documents, Pru District Assembly, 2014.

The Lease Contracts

During the field research, access to lease contracts was partially granted in Agogo by the traditional council, although no copy or transcript of its content was allowed. As confirmed in the literature, the contracts disclosed had a very simple structure and provided for the lease of the identified land for a period of 50 years against the payment of an annual rent of 6 *Cedis* (1.1 euro) per hectare to be reviewed every 5 years without exceeding the inflation rate. The contract foresaw the right to sublet part of the land after the prior consent of the chief. It also established that the governing law of the contract is Ghanaian law and that the competent courts are also Ghanaian.

It is to be noted that no provision concerning the preferential employment of locals, or development activities aimed at local communities, were foreseen in the contract. Although all the chiefs that were interviewed emphasized that their area required basic services delivery and that the investors would support the needs of the community, the lease contracts did not create any obligation of this kind. This problem has been noted in the literature, where the lack of legal literacy of chiefs is also problematized.¹⁷⁰ Whilst investors are supported by their legal teams in the drafting and revision of contracts, the same does not happen within the traditional councils so that the contracts are often generous in their requirements for investors. Moreover, it is difficult for chiefs to gauge the value of land in an international market, which enables investors to obtain profitable agreements with chiefs and to lease land at very low rates. To address this problem, the Government of Ghana through GCAP drafted a model lease contract that it encourages chiefs to use when leasing land to foreign investors.¹⁷¹

¹⁷⁰ Akwensivie, "Towards Win-Win Outcomes from Large-Scale Land-Based Investments in Ghana."

¹⁷¹ Ghana Commercial Agriculture Project, "Model Commercial Agriculture Lease Agreement," (Accra: Republic of Ghana, Ministry of Food and Agriculture, 2015).

This model lease contract contains specific provisions concerning the employment and the training of the local community, and also ensures that the concerns of the local communities are taken into consideration by both the investor and the chief. This document has been published in 2015 and as such no study on its application has been conducted yet.

IV. Concluding Remarks

This Chapter discussed the land tenure system in Ghana and highlighted the complexities of legal pluralism in the practice of land investments. The decentralized system of land management, which recognizes chiefs as stool land custodians and managers, clearly leaves room for opportunistic behaviors at the local level and does not afford protection to customary landholders, who are often excluded from consultations and compensation schemes. This is further exacerbated by the asymmetries between chiefs and investors in the negotiations. These outcomes are similar to the ones discussed in Chapter 3 with regards to Zambia, notwithstanding the fact that the land tenure systems in the two countries are different in the recognition they afford to customary law. Similarities and differences between the two countries in the unfolding of land investments will be discussed in the next Chapter.

Chapter 5:

Comparing the Case of Zambia and Ghana

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I. Introduction

The two previous chapters analyzed the land tenure systems of Zambia and Ghana and discussed the process that regulates land investments at the local level. Both the countries attracted the interest of foreign investors and displayed a significant increase in large-scale land acquisitions from 2005 onwards. Notwithstanding the presence of investment promotion agencies in both countries,¹ neither of the two has national records of land allocated to foreign investors, due to the decentralized nature of land management, and especially of customary land.² This makes it difficult to trace the land acquisitions, which moreover are not always fully reported to State institutions.³

The following pages will analyze the key similarities and differences in the land tenure systems of the two countries and in the unfolding of large-scale land acquisitions.

¹ The Zambia Development Agency (ZDA) and the Ghana Investment Promotion Center (GIPC) respectively.

² For a detailed discussion of this aspect, see Chapters 3 and 4.

³ As reported in the literature, in Ghana in 2015, up to two thirds of large-scale land leases were not yet registered (Gad Asorwoe Akwensivie, "Towards Win-Win Outcomes from Large-Scale Land-Based Investments in Ghana," in *World Bank Land and Poverty Conference* (Washington D.C.2015). In Zambia, evidence from the field research suggested that land titling may be gradually processed in "phases," so as to avoid the additional control imposed on land conversions of one thousand hectares and more. As such, the agreements with chiefs to release land cover larger areas than the ones processed in each phase of the titling process (Company A, Director, interview no. 13, Serenje, 11 February 2015; Chief A, interview no. 14, Chibale, 12 February 2015; Chief B, interview no. 21, Mumbwa, 20 February 2015; Company C, Officers, interview no. 22, Lusaka, 22 February 2015.) Moreover, it is important to note that in both countries the process of land registration is lengthy and as such land records are not up-to-date.

As this Chapter will argue, notwithstanding the differences between the rules in place in the two countries, the allocation of land to investors follows similar patterns and poses similar threats at the local level.

This Chapter is organized as follows: the next Section will discuss the land tenure structures and highlight the differences between Zambia and Ghana with particular reference to the role of traditional authorities and to land registration; the third Section will then discuss the process of land investment by comparing the patterns in the two countries.

II. Land Tenure in Zambia and Ghana

Land Ownership

It is important to note the difference between the land systems of the two countries with regards to land ownership. In Ghana, the Constitution vests in the President only public lands, whereas private lands are, by and large, vested in the Stool.⁴ The Constitution recognizes chiefs as land managers and fiduciaries on behalf of their community.⁵ As such, chiefs are ultimately responsible for the allocation and use of land – a robust position emanating from a history of resistance against colonial attempts to nationalize land. The British colonial administration never succeeded in vesting all unoccupied land in the Crown and the influence of chiefs never receded after Independence, notwithstanding initial attempts to curtail their role.⁶

To the contrary, in Zambia the colonial administration was successful in vesting all the land in the Crown by creating the duality between native reserves and Crown lands. At the time of Independence, land was transferred to the President, who holds it

⁴ Private lands are also vested in families and Skins: see Chapter 4 for a discussion of this aspect.

⁵ Constitution of Ghana, 1992, Article 36.8.

⁶ See the first Section of Chapter 4.

in trust on behalf the Zambian citizenry. In this framework, chiefs are regarded as custodians of land, but it is the President who holds all the land in perpetuity for and on behalf of the citizens of Zambia.

This important difference in the superior title to land, which is held by Stools, families and Skins in Ghana and by the President in Zambia, influences the way in which land allocation works, as the next paragraphs will discuss.

Land Registration and Conversion

Both the countries recognize the role of customary law in land management: only a minority of land is regulated by statutory norms and subject to the control of State authorities. In Ghana approximately 80 percent of land belongs to Stools, families, and Skins and as such is regulated by customary law.⁷ Similarly, the size of customary land in Zambia is officially presented as 94 percent of the national total,⁸ although this figure is outdated: some authors estimate that, following numerous land conversions, the real figure is considerably lower.⁹ It is to be noted that, when land is not registered, in both countries its management falls entirely under the responsibility of chiefs. Land registration changes the state of play between state and customary institutions, although in ways that differ in the two countries analyzed.

⁷ Kasim Kasanga and Nii Ashie Kotey, *Land Management in Ghana: Building on Tradition and Modernity* (London: International Institute for Environment and Development, 2001).

⁸ Jhon W. Bruce and Peter P. Dorner, "Agricultural Land Tenure in Zambia: Perspectives, Problems and Opportunities," in *Land Tenure Center Research Paper* (Madison, WI: Land Tenure Center, University of Wisconsin-Madison, 1983).

⁹ See for example: Taylor Brown, "Contestation, Confusion and Corruption: Market-Based Land Reform in Zambia," in *Competing Jurisdictions: Settling Land Claims in Africa*, ed. Sandra Evers, Marja Spiereburg, and Harry Wels (Amsterdam: BRILL, 2005); Horman Chitonge, "Customary Land in Zambia at Crossroads: Two Decades of Contested Land Policy and Reforms," paper presented at the *Workshop on the Interplay of Customary Law Rights in Land and Legal Pluralism* (Cape Town 2014), unpublished. For additional details on these aspects, see chapters 3 and 4.

In Zambia, the registration of customary land is foreseen by the Lands Act,¹⁰ which describes it as a “conversion.”¹¹ By providing a procedure to recognize customary rights on land and obtain a title issued by the Commissioner of Lands,¹² the Act ensures that once land is registered, chiefs lose their authority and control over it. The Act does not specify that the land conversion is permanent, but its functioning is clear: after the completion of the registration procedure, which entails the consent of the chief and the approval of the District Council, the leasehold title issued by the Commissioner of Lands is subject to the same rules that regulate state land.¹³ In practice, although the Act only speaks of “conversion of tenure,”¹⁴ the status of land is transformed from customary to state or titled land. It is important to note that, as foreseen by the Lands Act, if “the lessee breaches a term or a condition of a covenant”¹⁵ the land may be re-possessed by the Commissioner of Lands by means of a certificate of re-entry.¹⁶ Amongst such conditions, leases usually require the lessee to develop the land and prescribe that failure to do so causes re-entry.¹⁷ Even in the case of re-entry on a parcel of titled land that was converted from customary land, the land does not revert to the chief.

In Ghana the mechanism of land registration does not have the same legal consequences. Even with the registration of the lease with the Lands Commission, the status of land does not change –the land remains classified as Stool land.¹⁸ This implies that the authority of the chief over land is not extinguished, but simply modified in its

¹⁰ 1995 Lands Act.

¹¹ *Ibid.*, Section 8.

¹² As noted in Chapter 3, the President delegated his functions of land administration to the Commissioner of Lands (Mudenda, *Land Law in Zambia*).

¹³ See Section 8 of the Lands Act and the Lands (Customary Tenure) (Conversion) Regulations, 1996.

¹⁴ Section 8 of the Lands Act is entitled “Conversion of Customary Tenure into Leasehold Tenure.”

¹⁵ Lands Act, 1995, Section 13.

¹⁶ *Ibid.*

¹⁷ Circular no. LA/11202, 15 April 1992.

¹⁸ See Chapter 4, Section II.

scope.¹⁹ After the registration, the landholder's rights are protected against third parties, and against chiefs themselves, who in theory cannot alienate the same land again to another individual.²⁰ In this contractual relation, chiefs play the role of lessors and as such they are responsible for the enforcement of the lease contract. In case of contract termination or at the expiry of the lease, the land reverts to the Stool and the chief may lease it again to another user.²¹

The difference between the two registration systems is substantial and reflects the difference in the superior interest in land, which in Zambia is vested in the President and in Ghana in the Stool. Whereas in Zambia chiefs are only responsible for the first part of the conversion process, and the leasehold title is then issued by the Commissioner of Lands on behalf of the President, in Ghana chiefs directly allocate rights over stool land in the form of a lease contract and the registration serves the purpose of formalizing the transaction.

Land Revenues

The weak control of both States on customary and stool land also implies that land revenues for the state administration are limited: since most of the land is exclusively managed by traditional authorities, the collection of revenues from land transactions is their responsibility. As discussed in Chapter 3, chiefs in Zambia allocate land in exchange for a payment, considered an homage to the chief and an acknowledgement of

¹⁹ On the role of chiefs and land registration, see: Janine Ubink and Julian F. Quan, "How to Combine Tradition and Modernity? Regulating Customary Land Management in Ghana," *Land Use Policy* 25, no. 2 (2008).

²⁰ Cases of double alienations are still possible, but they would be identified at an early stage when the second individual would attempt to register the lease at the Lands Commission. In such cases, a first mediation is offered by the Lands Commission itself; when this fails, the only remedy is litigation. It is important to note that about 85 percent of court cases in Ghana are based on claims to land (Land Administration Project: <http://www.ghanalap.gov.gh/index.php/activities2/published-land-cases>. Accessed: 1 June 2016.)

²¹ See Chapter 4.

his authority.²² Similarly in Ghana, according to customary law, chiefs allocate land to strangers in exchange for the payment of “drink money,” a sum that ensures respect is paid to the local chief and which grants access to land.²³ Moreover, the payment of rent for the use of land may be requested. In these transactions, payments are directly made to the chief, and not to the state administration.

After the registration of title over land, the system of revenue collection changes radically. When customary land is covered by title in Zambia, the related lease entails the payment of ground rent to the State, and not to the chief, who loses its control over the titled land.²⁴ As such, the stream of revenues deriving from land becomes entirely available to the State, with no redistribution directly foreseen in favour of chiefs. Even in cases of re-entry and subsequent issue of title to another individual, the revenues will not accrue to the chief who converted the land.

In Ghana, after the registration of land, rent is no longer due to the chief but to the Office of the Administrator of Stool Land.²⁵ This Office is responsible for the collection of rent and for its distribution according to the formula foreseen by the Constitution, which allocates a share to the Office itself (10 percent), as well as to the Stool, the Traditional Council, and the District Assembly (respectively 25, 20 and 55 percent of the remaining 90 percent).²⁶ After this revenue distribution, chiefs receive about 40 percent of the rent paid on stool land, whereas the state administration obtains the majority of it.

Thus, it becomes clear that in the long term the registration and conversion of land lead to a substantial decrease in revenues for chiefs and traditional councils, and a

²² Fredrick S. Mudenda, *Land Law in Zambia* (Lusaka: University of Zambia Press, 2007).

²³ Ubink and Quan, "How to Combine Tradition and Modernity? Regulating Customary Land Management in Ghana".

²⁴ Mudenda, *Land Law in Zambia*.

²⁵ Constitution of Ghana, 1992, Article 267.2.b.

²⁶ Constitution of Ghana, 1992, Article 267.6.

respective increase for the State. With regards to large-scale investments, it must be noted that registration is not always sought, or not immediately sought – especially in Ghana, where the literature reported that about 2 thirds of the large-scale investments are not registered.²⁷ This aspect will be discussed in Section III.

Customary and Stool Land: Inalienable, but not in Practice

Land in the customary domain is considered a crucial resource for local communities and should be administered in their interest. As such, one of its key characteristic both in Zambia and Ghana is its inalienability, which however unfolds in different ways.

As the Lands Act prescribes, “all land in Zambia shall vest absolutely in the President and shall be held by him in perpetuity for and on behalf of the people of Zambia.”²⁸ As such, only leasehold titles for a maximum of 99 years may be issued over land.²⁹ The transfer of title between individuals entails a private transaction which results in an application by the seller to the Commissioner of Lands, who will proceed to issue a title deed to the buyer. In such cases, a payment for the transaction is processed between the two parties involved. In the case of customary land and its conversion, the Lands Act clarifies that “no consideration shall be paid”³⁰ for it. As discussed in Chapter 3, this rule, which could provide a safeguard to customary landholders to guarantee them equal access to title, is in practice not applied. In the process of land conversion, a private transaction between the chief and the “buyer” entails the payment of an amount for the release of land.³¹ Although this transaction is in practice similar to a land sale, according to both customary and state law customary

²⁷ Akwensivie, "Towards Win-Win Outcomes from Large-Scale Land-Based Investments in Ghana".

²⁸ Lands Act, 1995, Section 3.

²⁹ Mudenda, *Land Law in Zambia*.

³⁰ Lands Act, 1995, Section 4.

³¹ Brown, "Contestation, Confusion and Corruption: Market-Based Land Reform in Zambia".

land is not considered a commodity and is not marketable. By allocating land in exchange for personal payments, chiefs violate their role of land custodians and thus impact on the access to land within their communities, for which customary land is permanently alienated.³²

In Ghana, the Constitution prohibits the creation of freehold interest over stool land³³ and thus prescribes that stool land shall not be sold. Moreover, it prevents foreigners from holding freehold title over land in the country.³⁴ Chiefs are recognized as custodian of the land on behalf of the Stool, but there is ample evidence in the literature of stool land transactions in which chiefs act as owners, and not custodians of stool land, thus alienating land in exchange for personal payments. This tendency is widely documented in studies on peri-urban areas,³⁵ where the pressure on land has increased and the payment of “drink money” may be compared to a market price for stool land.³⁶ Land is made available to investors by chiefs in exchange for the payment of a “token” or in exchange for other benefits, such as the building of a new palace or the purchase of new cars.³⁷

It is important to note that, as the next Section will elaborate, state institutions do not oppose these illegal transactions and *de facto* exert very limited scrutiny on them, both in Ghana and Zambia. However, these transactions have important consequences for local communities on behalf of which land should be managed. To them, these land alienations often entail displacement without a compensation as well as a reduction in their access to common pool resources. Commercial pressures over land thus increase

³² *Ibid.*

³³ Constitution of Ghana, 1992, Article 197.5.

³⁴ Constitution of Ghana, 1992, Article 265.

³⁵ See the work of Ubink, and for example: "Traditional Authority Revisited: Popular Perceptions of Chiefs and Chieftaincy in Peri-Urban Kumasi, Ghana," *Journal of Legal Pluralism and Unofficial Law* 55 (2007).

³⁶ Ubink and Quan, "How to Combine Tradition and Modernity? Regulating Customary Land Management in Ghana".

³⁷ See Chapter 4.

tenure insecurity, even in contexts in which the formalization of customary titles has been introduced precisely to *improve* tenure security. As one of the participants in the research noted, “land is in fact free and traditional land should be given for free. Now, because people have understood the value of land, the chiefs are now charging for the same land.”³⁸ Against this background, local users may be “priced-out” of their land and lose access to important resources that determine their livelihood.³⁹

As discussed above, these illegal sales reinforce the asymmetries of power that already exist at the local level: the local elites have an opportunity to gain from the sales, whereas the rest of the community is exposed to the risk of dispossession and of loss of access to land. Therefore, an important challenge in both Zambia and Ghana is to ensure that land transactions benefit the whole community. In this context, for both countries the global land rush⁴⁰ poses serious challenges in terms of land governance, as it calls for a better distribution of revenues and for stronger protection of customary land rights of the communities, even in countries where they are already, at least on paper, protected.

III. Large-scale Agricultural Investments: Comparing the Processes

Access to Agricultural Land

As mentioned above, in both the countries analyzed investors may not purchase land, since freehold titles are not obtainable, but may only access it by means of lease contracts. In Ghana, the lease may in principle cover public and stool land, whereas in

³⁸ Ministry of Chiefs and Traditional Affairs, District Officer, interview no. 16, Mumbwa, 18 February 2015.

³⁹ For a discussion of this aspect, see Chapter 1, Section VII. An overview is provided in: Pauline E. Peters, "Challenges in Land Tenure and Land Reform in Africa: Anthropological Contributions," *World Development* 37, no. 8 (2009).

⁴⁰ See Chapter 2.

Zambia it is only possible to obtain leasehold title over state land, and as such, the prior conversion of customary land is necessary. However, in both countries the majority of land falls under the customary domain and it is classified as customary land (in Zambia) or stool land (in Ghana). Inevitably, most large-scale land investments are not located on already existing public or state land, but on land in the customary domain.⁴¹

To facilitate access to land for investors, both countries have introduced similar measures. In Zambia, in order to simplify access to large tracks of land, in 2005 the Government initiated a Farm Block Development Plan,⁴² with the objective to create large commercial farm blocks in which infrastructure is provided by the Government.⁴³ The implementation of the Plan entails the progressive conversion of customary land to create farm blocks on titled land, who are then made available to investors through a bidding process. This project will also ensure an increase in the flow of revenues for the State, as the land transactions with investors will not involve chiefs. However, the implementation of the Plan has been hindered by delays and lack of resources so that its objectives have not yet been achieved.⁴⁴ Alongside this initiative, ZDA holds a Land Bank of titled land that may be leased to investors, although the literature and the fieldwork indicate that its role is marginal.⁴⁵

In Ghana, the Land Administration Project foresees an incremental acquisition of control over stool land by means of land registration as well as the creation of

⁴¹ See Chapter 3 and 4 for a more detailed discussion of land tenure in Zambia and Ghana.

⁴² Ministry of Finance and National Planning, "Farm Block Development Plan 2005-2007," (Lusaka 2005).

⁴³ See Chapter 3, Section III.

⁴⁴ On farm blocks, see: Jessica Chu, "Creating a Zambian Breadbasket - 'Land Grabs' and Foreign Investments in Agriculture in Mkushi District," in *LDPI Working Paper* (The Hague: Land Deals Politics Initiative, 2013); Lauren Honig, "State Land Transfers and Local Authorities in Zambia," in *International Conference on Global Land Grabbing II* (Ithaca, NY2012).

⁴⁵ Kerstin Nolte, "Large-Scale Agricultural Investments under Poor Land Governance in Zambia," *Land Use Policy* 38(2014); ZDA, Land Expert, interview no. 3, Lusaka, 30 January 2015.

Customary Land Secretariats.⁴⁶ Moreover, to address the needs of investors the project also entails the creation of a Land Bank Registry, which contains land that has already been made available by traditional authorities across the country.⁴⁷ In line with this policy, the Ghana Commercial Agriculture Project (GCAP) entails a stronger involvement of state institutions in the identification of investment locations in order to simplify access to land in the country. Like the Farm Block Development Plan in Zambia, GCAP aims to simplify access to land for agricultural investment and to ensure that investors negotiate the terms of these transactions directly with state institutions, and not with chiefs.⁴⁸

The abovementioned initiatives still play a marginal role in providing access to land for investors, which in both countries is instead ensured by traditional authorities. To gain access to land, investors negotiate with chiefs with the help of a facilitator. In the field research, it was noted that in Ghana local middlemen assisted investors in the negotiations. The role of the Ghana Investment Promotion Center (GIPC) in this phase was very limited: in the interviews it emerged that none of GIPC officials participated in the meetings between chiefs and investors.⁴⁹ GIPC appeared to provide advice on the districts in which land is available, without getting involved in the local negotiations over land.⁵⁰ Contrary to this, Zambia Development Agency (ZDA) officials played the

⁴⁶ See Chapter 4.

⁴⁷ Akwensivie, "Towards Win-Win Outcomes from Large-Scale Land-Based Investments in Ghana." See Chapter 4 for further details on this aspect.

⁴⁸ On GCAP, see the introduction of the following report: Ministry of Food and Agriculture, "Ghana Commercial Agriculture Project: Recommendations for Large-Scale Land-Based Investment in Ghana," (Accra: Government of Ghana, 2015).

⁴⁹ Ghana Investment Promotion Center, Investment Promotion Officer, interview no. 4, Accra, 17 November 2014; Company A, Chief Operations Officer, interview no. 13, Kumasi, 1 December 2014; Company B, Chief of Operations, interview no. 17, Agogo, 3 December 2014; Company C, Community Liaison Officer, interview no. 23, Bantema, 10 December 2014.

⁵⁰ The literature confirms these findings. In particular, German and others noted that "[t]he Government of Ghana, however, did not appear to have an active role in enabling... land acquisitions." (Laura German, George Schoneveld, and Esther Mwangi, "Contemporary Processes of Large-Scale Land Acquisition by Investors: Case Studies from Sub-Saharan Africa," in *Occasional Papers* (Bogor, Indonesia: Center for International Forestry Research 2011), 19.

role of facilitators between investors and chiefs and helped the two parties reach a written agreement on the release of land.⁵¹ The presence of ZDA reassured investors of the support of State institutions to the investment, and also guaranteed that the process of land conversion would proceed smoothly. It is important to note that customary land conversions of more than 250 hectares are subject to stricter scrutiny from the Commissioner of Lands.⁵² Therefore, investors consider the support of ZDA as an assurance that the District Council recommendations will be adhered to and that the title to land will be issued.

The negotiations between chiefs and investors are characterized by a strong power asymmetry. It is important to note that in rural areas chiefs have little understanding of land prices in the global market. Moreover, their legal education is very limited and their expectations on the benefits of land investments are often unrealistic.⁵³ This allows investors to maximize their profit by securing land at a nominal price. Moreover, the expected benefits from the investment, which include preferential employment for locals and building of critical social infrastructure, are not formalized in the contracts.⁵⁴ As such, investors are often not bound by these verbal agreements.

⁵¹ The role of ZDA in the land transactions was confirmed by all the informants and in particular by the following: Civil Society Organization, Social and Economic Justice Officer, interview no. 1, Lusaka, 26 January 2015; Zambia Development Agency, Land Expert, interview no. 3, Lusaka, 30 January 2015; Ministry of Agriculture and Livestock, Department of Agriculture, Principal Agricultural Specialist, interview no. 6, Lusaka, 2 February 2015; Company A, Director, interview no. 13, Serenje, 11 February 2015; Chief A, interview no. 14, Chibale, 12 February 2015.

⁵² Ministry of Lands and Natural Resources, Administrative Circular no. 1 of 1985. See Chapter 3 for further details.

⁵³ See chapters 3 and 4.

⁵⁴ As mentioned in chapters 3 and 4, this aspect has been widely documented in the literature. See for example: Lorenzo Cotula and Sonja Vermeulen, "Contexts and Procedures for Farmland Acquisitions in Africa: What Outcomes for Local People?," *Development* 54, no. 1 (2011); George Schoneveld, Laura German, and Eric Nutakor, "Land-Based Investments for Rural Development? A Grounded Analysis of the Local Impacts of Biofuel Feedstock Plantations in Ghana," *Ecology and Society* 16, no. 4 (2011); Ward Anseeuw et al., "Land Rights and the Rush for Land: Findings of the Global Commercial Pressures on Land Research Project," (Rome: International Land Coalition, 2012); Akwensivie, "Towards Win-Win Outcomes from Large-Scale Land-Based Investments in Ghana".

Land Investments and Local Communities

As discussed in Chapter 2, many studies have documented that large-scale land acquisitions in developing countries are problematic and emphasized in particular two of the threats that they pose at the local level.⁵⁵ First, in the literature there is ample evidence of dispossession of local land users.⁵⁶ Second, the lack of consultation with the community before the allocation of land to investors has been highlighted in many studies.⁵⁷

Both these problems have also been identified in the field research, thus confirming that the management of land investments is poor. Notwithstanding the data indicating significant availability of land in both countries,⁵⁸ local land users have lamented that the land they were farming was transferred to investors without their knowledge,⁵⁹ which has independently been confirmed by other participants in the research.⁶⁰ Large-scale investments take place in rural areas where the majority of the population is engaged in subsistence agriculture and as such is heavily dependent on

⁵⁵ This aspect has been discussed in Chapter 2, Section VI.

⁵⁶ See for example: Olivier De Schutter, "How Not to Think About Land-Grabbing: Three Critiques of Large-Scale Investments in Farming," *Journal of Peasant Studies* 38, no. 2 (2011); Liz Alden Wily, "Looking Back to See Forward: The Legal Niceties of Land Theft in Land Rushes," *ibid.* 39, no. 3-4 (2012); Laura German et al., "Shifting Rights, Property and Authority in the Forest Frontier: 'Stakes' for Local Land Users and Citizens," *The Journal of Peasant Studies* 41, no. 1 (2014). For a discussion of this aspect, see Chapter 2, Section VI.

⁵⁷ See amongst others: Sonja Vermeulen and Lorenzo Cotula, "Over the Heads of Local People: Consultation, Consent, and Recompense in Large-Scale Land Deals for Biofuels Projects in Africa," *ibid.* 37, no. 4 (2010); Akwensivie, "Towards Win-Win Outcomes from Large-Scale Land-Based Investments in Ghana".

⁵⁸ See for example: Klaus Deininger and Derek Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?* (Washington, DC: World Bank, 2011).

⁵⁹ For Zambia: Community members, focus group discussion no. 1, Mpande, 13 February, 2015; Community members, focus group discussion no. 2, Moono, 20 February, 2015. For Ghana: Community members, Focus Group Discussion 1, Dukusen, 4 December 2014; Community members, Focus Group Discussion 2, Lailai, 12 December 2014; Community members, Focus Group Discussion 3, Lailai, 12 December 2014.

⁶⁰ For Zambia: Ministry of Agriculture and Livestock, District Senior Agricultural Officer, interview no. 12, Serenje, 11 February 2015; Ministry of Chiefs and Traditional Affairs, District Officer, interview no. 16, Mumbwa, 18 February 2015. For Ghana: Office of the Administrator of Stool Lands, Ministry of Lands and Natural Resources, Officer, interview no. 2, Accra, 12 November 2014.

land. Moreover, in spite of the provisions in place in both Zambia and Ghana, to ensure the consultation of local communities, which are prescribed both by environmental and land law,⁶¹ they appear to be excluded from the early stages of the projects, which are exclusively managed by chiefs, district authorities and investors.

As such, it is clear that in both countries the processes through which investors access land violates statutory provisions aimed at protecting local land users. Moreover, it conflicts with the role of custodians of land that chiefs play on behalf of their communities. As noted in the literature and confirmed in the field research, state institutions do not “interfere” with local land transactions and exert very limited control over them.⁶² This leaves room to local elites to gain from land allocations at the expense of local communities, who are not involved in the decision-making process. The next paragraph will elaborate on the role of State institutions in land allocations.

The Role of State Institutions

In Zambia, upon receipt of the letter of consent of the chief requiring the land conversion, the District Council shall verify that this is not contrary to the customary law of the area.⁶³ After its approval, the Council recommends the conversion to the Commissioner of Lands. As emerged in the interviews, the approval of the District Council is “almost automatic,”⁶⁴ especially when ZDA has been involved in the negotiations over land.⁶⁵ For the investments analyzed in this research and which entailed a land conversion, title had not yet been issued by the Commissioner of Lands, so it was not possible to ascertain whether this institution effectively scrutinizes the land

⁶¹ See chapters 3 and 4.

⁶² See for example: Akwensivie, "Towards Win-Win Outcomes from Large-Scale Land-Based Investments in Ghana."; German, Schoneveld, and Mwangi, "Contemporary Processes of Large-Scale Land Acquisition by Investors: Case Studies from Sub-Saharan Africa".

⁶³ Lands (Customary Tenure) (Conversion) Regulations, 1996, Section 3.

⁶⁴ Zambia Development Agency, Land Expert, interview no. 3, Lusaka, 30 January 2015.

⁶⁵ District Council, Officer, interview no. 11, Serenje, 10 February 2015.

transactions. However, the investments analyzed were already operational and investors were very confident that they would obtain leasehold title.⁶⁶

In Ghana, the Lands Commission is responsible for land registration. This institution is required by the Constitution to give its consent to the alienations of stool land,⁶⁷ but in practice, as highlighted in the literature, land has already been leased when the Lands Commission is approached.⁶⁸ Moreover, the Constitution requires the Lands Commission to verify that the alienation of land is consistent with the development plan of the area. As reported in the interviews, this requirement is very vague and in practice the Lands Commission does not object to land allocations decided by chiefs.⁶⁹

It is worthwhile noting that in both the countries, the chiefs interviewed expressed their hesitance to “give away” land and register it. In Zambia a chief noted that

if you have to sign the papers for the investor, then you can't control anymore what he does on the land because you have given it away, that is why I prefer when they don't ask me for the papers... If the whole of your chieftdom you finish by giving it away, then it is the end of chieftaincy.⁷⁰

Similarly, in Ghana, a chief clearly stated that “if I don't have the papers registered, then I am more protected, because I can take back the land if needed and the investors cannot trick me.”⁷¹

⁶⁶ Company A, Director, interview no. 13, Serenje, 11 February 2015; Company C, Officers, interview no. 22, Lusaka, 22 February 2015.

⁶⁷ Constitution of Ghana, 1992, Article 258.1.b.

⁶⁸ Ubink and Quan, "How to Combine Tradition and Modernity? Regulating Customary Land Management in Ghana".

⁶⁹ Office of the Administrator of Stool Lands, Ministry of Lands and Natural Resources, Officer, interview no. 2, Accra, 12 November 2014; Government of Ghana, Communication Officer, interview no. 5, Accra, 19 November 2014; Lands Commission, Officer, interview no. 8, Accra, 25 November 2014.

⁷⁰ Chief B, interview no. 21, Mumbwa, 20 February 2015.

⁷¹ Nsuta Traditional Council, Paramount Chief, interview no. 12, Nsuta, 29 November 2014.

Contestation of Borders

For investors in both Zambia and Ghana, the advantage of being allocated large tracks of land from chiefs derives from the added value that can be produced on it and the return on investment. Stool land and customary land are not considered by the law as commodities and cannot be purchased.⁷² As such, they are only subject to the payment of a yearly rent, which is proportionate to the size and location of the land, and to the processing fees for registration to be paid to the Lands Commission (in Ghana) or the District authorities (in Zambia). The additional payments, which happen in the shadow of both customary and state law and which ensure the allocation of land, do not substantially increase the cost of stool and customary land.

However, as documented in the literature⁷³ and highlighted in the field research, investors experience problems in their access to land. Both in Zambia and Ghana cases have been identified in which the authority of a chief to allocate land to an investor was contested, and struggles for the control over the resources re-emerged. In the cases analyzed, investors accepted to make additional payments to resume operations and facilitate the conclusion of the controversy.⁷⁴ This resulted in an increase in the fees related to the land allocated, but it ensured a rapid solution and prevented litigation. The contestation of chiefly authority has been widely documented in the literature⁷⁵ and

⁷² See chapters 3 and 4 for a discussion of this aspect.

⁷³ See for example: Deininger and Byerlee, *Rising Global Interest in Farmland: Can It Yield to Sustainable and Equitable Benefits?*.

⁷⁴ This was the case in both the District of Mumbwa (Zambia) and Pru (Ghana). In Mumbwa (Zambia) the company interviewed preferred paying two different chiefs for the same parcel of land to be leased, instead of engaging into costly and lengthy litigation in local courts. Similarly, in the district of Pru (Ghana) a company's project was stalled by the conflict between two chiefs, who both claimed authority over the land; in an effort to restore operational peace and continue with the project, the company accepted to make a payment to both the disputed chiefs. See chapters 3 and 4 for additional details on this aspect.

⁷⁵ See for example: Brown, "Contestation, Confusion and Corruption: Market-Based Land Reform in Zambia."; Mitzi Goheen, "Chiefs, Sub-Chiefs and Local Control: Negotiations over Land, Struggles over Meaning," *Africa: Journal of the International African Institute* 62, no. 3 (1992).

commercial pressures on land contribute to increasing it: the potential revenues that can be extracted from land make competition for its control fierce.

Conclusion

This work, which combined a review of the literature on land investments in sub-Saharan Africa with empirical research conducted in rural districts of Zambia and Ghana, clearly illustrated the challenges that large-scale land acquisitions pose to local land systems. As discussed in the last Chapter, in both countries the allocation of land to investors is the outcome of negotiations at the local level, in which the existing asymmetries of power and resources impact on the process and outcome of land transactions.

The pluralism of norms at play is used instrumentally by powerful actors to secure personal benefits. In land transactions, chiefs and investors use strategically the often contradictory sets of laws they have available to their own advantage. This is particularly clear when looking at the payments made by investors to chiefs to secure land: chiefs appeal to customary law that entitles them to be paid an homage and thus to justify the disbursements for the release of land. This results in *de facto* sales, which subtract land from the community—permanently in Zambia, and until the expiry of the lease in Ghana.¹ In rural areas, where the majority of the population relies on subsistence agriculture, this is particularly problematic and has a significant impact on access to resources. The ambiguity of this tribute also leaves room for negotiation so that land may easily be alienated at far below its true value.

From the research it appears that investors and chiefs stand to gain the most from these transactions. Investors are able to secure access to land for a nominal price and thus obtain greater return on their investment. Simultaneously, chiefs obtain personal short term gains, both in the form of revenue streams and other benefits.

¹ As mentioned in Chapter 4, in Ghana foreigners may only obtain leases of up to 50 years, which may then be renewed. In Zambia, the conversion of customary land is instead permanent.

In effect, a price tag is put on land in the customary domain that is far below the market value seen in the developed world. As noted in the literature, the price of land is low precisely because land in the customary domain may not be sold.² This rule is in place to ensure that customary landholders are protected and to also guarantee that customary as well as stool land are used for the benefit of the community. However, increasing commercial pressures on land create opportunities for personal gain for the actors responsible for land management. As a consequence, customary landholders suffer the risk of displacement and dispossession without adequate guarantees of compensation or alternative means of livelihood.

The strategic use of norms by powerful actors is also highlighted by the lack of community consultation at the local level. Although consultation is prescribed by state law, the field research showed that affected communities were not involved in the decision-making on the land transactions. In this regard, chiefs strategically appeal to their customary role as custodians of land and heads of their communities, and as such do not involve local people in the decision-making process. This lack of consultation, however, may prove risky for investors as resistance from local land users may emerge at the commencement of operations. Nonetheless, this route is often taken as it simplifies and hastens the process through which investors can access land.

It is important to note that these investments may lead to employment opportunities for local communities as well as infrastructural development and basic service delivery. However, from the research it appears that written agreements between chiefs and investors do not foresee obligations towards the provision of these

² Peters writes in this sense: "The reason for these 'low' prices is that customary rights over the vast majority of cultivable (and grazing, wooded and common) lands are not deemed to be full property and are being set aside by representatives of African states in the name of development and the public interest, even though more often the beneficiaries are, or are likely to be, private individuals and groups with the clout to arrange these deals. (Pauline Peters, "Conflicts over Land and Threats to Customary Tenure in Africa," *African Affairs* 112, no. 449 (2013): 560.)

supplementary benefits to the community. Such benefits are often agreed upon only verbally and thus are not legally enforceable.

It is still too early to gauge the long term effect of the recent surge in large-scale land acquisitions, but the lack of transparency in land transactions clearly leaves room for personal advantages to actors that are in powerful positions at the local level. As noted in the literature, the authoritative role of chiefs, which grants them the power to allocate land, ultimately implies that what comes forth out of these transactions will depend much on the individual chief's willingness to share these gains with the community or from his ability to protect the interest of local people.³ However, a pattern of marginalization of customary law results clearly from these transactions, which eventually reduce the space for customary tenure and standardize land relations in line with the investors' production needs. This tendency appears in continuity with the process of standardization of norms started in the colonial period, which carried on with the structural adjustment policies and the opening of African markets to the global economy.⁴

The complexities of large-scale land investments in sub-Saharan Africa are further exacerbated by not only internal struggles for authority between chiefs and State, or between neighbouring chiefs themselves, but also and especially by the power asymmetries found between chiefs and international investors with ample access to financial resources and legal expertise. These vertical asymmetries, which operate between local and international actors, impact on the distributional outcomes from land

³ Kerstin Nolte, "Large-Scale Agricultural Investments under Poor Land Governance in Zambia," *Land Use Policy* 38, (2014).

⁴ For an analysis of this aspect, see: Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law Is Illegal* (London, Blackwell: 2008).

transactions: whereas this research focused on the effects at the local level, those on the global level have also been scrutinized and discussed in the literature.⁵

In analyzing large-scale acquisitions, a paradox on land tenure security emerges. In order to promote the latter, and due to the pressure of structural adjustment policies, both Zambia and Ghana introduced systems that allow for customary land rights to be protected (through the conversion of tenure in Zambia and the land registration in Ghana), but these systems may easily be used by powerful elites for personal gains at the expense of customary landholders themselves. This finding is in line with the literature that critically reviewed the effects of land titling policies and argued that they tend to reinforce inequalities at the local level.⁶ As such, it is important to scrutinize the outcome of large-scale land acquisitions to ensure the protection of customary landholders before commercial pressures.

The history of both countries shows clearly that large-scale land acquisitions are not in themselves a new phenomenon. Starting from the colonial period, land alienations and concessions on a large-scale have been documented in both countries.⁷ It is abundantly clear that the legacy of both these countries' colonial past is still impactful with regards to land management. However, this is not the only challenge facing the

⁵ See for example: Haroon A. Akram-Lodhi, "Land, Markets and Neoliberal Enclosure: An Agrarian Political Economy Perspective," *Third World Quarterly* 28, no. 8 (2007); Kojo Sebastian Amanor, "Sustainable Development, Corporate Accumulation and Community Expropriation: Land and Natural Resources in West Africa," in *Land and Sustainable Development in Africa*, edited by Kojo Sebastian Amanor and Sam Moyo (London, Zed Books, 2008); Lorenzo Cotula, "Commercial Pressures and Legal Rights: The Trouble with the Law Regulating Agricultural Investment in Africa," *QA - Rivista dell'Associazione Rossi-Doria* 2 (2013); Ambreena Manji, *The Politics of Land Reform in Africa: From Communal Tenure to Free Markets* (London, Zed Books, 2006).

⁶ See for example: Celestine Nyamu Musembi, "De Soto and Land Relations in Rural Africa: Breathing Life into Dead Theories About Property Rights," *Third World Quarterly* 28, no. 8 (2007); Philippe Lavigne Delville, "Harmonising Formal Law and Customary Rights in French-Speaking Westafrica," in *Drylands Programme Issue Papers* (London: International Institute for Environment and Development, 1999); Philip Woodhouse, "African Enclosures: A Default Mode of Development?," *World Development* 31, no. 10 (2003); David A. Attwood, "Land Registration in Africa: The Impact on Agricultural Production," *World Development* 18, no. 5 (1990); Parker Shipton, "The Kenyan Land Tenure Reform: Misunderstandings in the Public Creation of Private Property," in *Development Discussion Paper* (Harvard Institute for International Development, 1987). For a discussion of this aspect, see Section VII of Chapter 2.

⁷ C.K. Meek, *Land Law and Custom in the Colonies* (Oxford: Oxford University Press, 1946)

region: participation in the global economy is confronting the pluralist systems found and more transparency and accountability in the management of land transaction will doubtless benefit local communities. It remains to be seen how customary law, currently confronted with international actors and significant asymmetries of power, will adapt to these new challenges.

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"Government to Revise Land Act and Land Policy." Lusaka Times, 17 March 2017.

"Govt. Committed to Fighting Illegal Land Allocation." Lusaka Voice, 27 February 2013.

Interviews and Focus Group Discussions

Zambia

Civil Society Organization, Social and Economic Justice Officer, interview no. 1, Lusaka, 26 January 2015

Ministry of Agriculture and Livestock, Policy and Planning Department, Chief Economist, interview no. 2, Lusaka, 27 January 2015

Zambia Development Agency, Land Expert, interview no. 3, Lusaka, 30 January 2015

Ministry of Traditional Affairs and Chieftaincy, Officer, interview no. 4, Lusaka, 4 February 2015

Ministry of Lands, Natural Resources and Environmental Protection, Commissioner of Lands, interview no. 5, Lusaka, 6 February 2015

Ministry of Agriculture and Livestock, Department of Agriculture, Principal Agricultural Specialist, interview no. 6, Lusaka, 2 February 2015

Zambia Environmental Management Agency, Senior Inspector, interview no. 8, 5 February 2015

Attorney and Land Law Practitioner, interview no. 9, Lusaka, 4 February 2015

Ministry of Agriculture and Livestock, Acting District Land Husbandry Officer, interview no. 10, Serenje, 9 February 2015

Ministry of Agriculture and Livestock, District Senior Agricultural Officer, interview no. 12, Serenje, 11 February 2015

Company A, Director, interview no. 13, Serenje, 11 February 2015

Chief A, interview no. 14, Chibale, 12 February 2015

District Council, Planning Officer, interview no. 18, Mumbwa, 19 February 2015

District Council, Physical Planning Officer, interview no. 19, Mumbwa, 19 February 2015

Company B, Officers, interview no. 20, Mumbwa, 19 February 2015

Chief B, interview no. 21, Mumbwa, 20 February 2015

Company C, Officers, interview no. 22, Lusaka, 22 February 2015

Zambia Development Agency, Land Expert, interview no. 25, Lusaka, 26 February 2015

Land Law Lecturer, interview no. 26, Lusaka, 27 February 2015

Community Members, focus group discussion no. 1, Mpande, 13 February 2015

Community Members, focus group discussion no. 2, Moono, 20 February 2015

Ghana

Civil Society Representative, interview no. 1, Accra, 10 November 2014

Office of the Administrator of Stool Lands, Ministry of Lands and Natural Resources, Officer, interview no. 2, Accra, 12 November 2014

Ghana Commercial Agriculture Project, Ministry of Food and Agriculture, Project Coordinator, interview no. 3, Accra, 14 November 2014

Ghana Investment Promotion Center, Investment Promotion Officer, interview no. 4, Accra, 17 November 2014

Government of Ghana, Communication Officer, interview no. 5, Accra, 19 November 2014

Agribusiness Support Division, Ministry of Food and Agriculture, Head of Division, interview no. 6, Accra, 19 November 2014

Ministry of Food and Agriculture, Officer, interview no. 11, Ejura, 28 November 2014

Nsuta Traditional Council, Paramount Chief, interview no. 12, Nsuta, 29 November 2014

Company A, Chief Operations Officer, interview no. 13, Kumasi, 1 December 2014

Agogo Traditional Council, Divisional Chief and Registrar, interview no. 14, Agogo, 2 December 2014

Company B, Chief of Operations, interview no. 17, Agogo, 3 December 2014

Agogo Traditional Council, Divisional Chief and Registrar, interview no. 18, Agogo, 4 December 2014

Office of the Administrator of Stool Lands, Stool lands officer, interview no. 20, Nsyuta, 8 December 2014

Lands Commission, Officer, interview no. 21, Nsyuta, 8 December 2014

Atebubu Traditional Council, Divisional chief, interview no. 22, Atebubu, 9 December 2014

Company C, Community Liason Officer, interview no. 23, Bantema 10 December 2014

Atebubu Traditional Council, Registrar, interview no. 24, Atebubu, 10 December 2014

Ministry of Food and Agriculture, District Officer, interview no. 25, Atebubu, 11 December 2014

Atebubu District Assembly, Officer, interview no. 26, 11 December 2014

Agogo Traditional Council, Registrar, interview no. 27, Agogo, 15 December 2014

Yeji Traditional Council, Paramount Chief and Divisional Chiefs, Yeji, interview no. 30, 18 December 2014

Weise Traditional Council, Paramount Chief, Weise, interview no. 32, 22 December 2014

Agogo Traditional Council, Paramount Chief, Accra, interview no. 33, 30 December 2014

Community Members, Focus Group Discussion 1, Dukusen, 4 December 2014

Community Members, Focus Group Discussion 2, Lailai, 12 December 2014

Community Members, Focus Group Discussion 3, Lailai, 12 December 2014.

Legislation

Zambia

Northern Rhodesia Order in Council, 1911

Northern Rhodesia (Crown Lands and Native Reserves) Order in Council, 1928

Northern Rhodesia (Native Reserves) Supplementary Order in Council, 1929

Northern Rhodesia (Native Trust Land) Order in Council 1947

Zambia (State and Native Reserves) Order, 1964

Zambia (Trust Land) Order, 1964

Chiefs Act, 1965

Land (Conversion of Titles) Act, 1975

Land (Conversion of Titles) Act (Amendment), 1985

Ministry of Lands and Natural Resources, Administrative Circular no. 1 of 1985

Zambia Privatisation Act, 1992

Zambia Investment Act, 1993

Zambia Export Development Act, 1994

Lands Act, 1995

Small Enterprise Development Act, 1996

Lands (Customary Tenure) (Conversion) Regulations, Statutory Instrument no. 89 of 1996

Environmental Protection and Pollution Control (Environmental Impact Assessment) Regulations, Statutory Instrument no. 28 of 1997

Zambia Development Agency Act, 2006

Ghana

Public Land Ordinance, 1876

Registration Ordinance, 1883

Land Registry Ordinance, 1895

Northern Territories Ordinance, 1902

State Property and Contracts Act, 1960

Administration of Lands Act, 1962

Lands Commissions Act, 1971

Lands Title Registration Act, 1986
Lands Commission Act, 1994
Ghana Investment Promotion Center Act, 1994
Free Zones Act, 1995
Environmental Protection Act, 1994
Environmental Assessment Regulations, 1999

Websites

www.data.worldbank.org

www.ghanalap.gov.gh

www.gipcghana.com

www.landmatrix.org

www.unctadstat.unctad.org

Annex

Interview Script

The semi-structured interviews took place with a wide range of actors, including traditional authorities, investors, government officials as well as civil society representatives. As such, the questions were adapted to the interviewee and elaborated on the basis of the responses obtained and of the experience of the interviewee. The script was based on the following general questions:

Have you witnessed an increase in large-scale land acquisitions by foreign investors? If so, can you recall some examples of large-scale land acquisitions in the country/region/province/district/traditional area?

Are you aware of the process through which these acquisitions take place and of the way in which the land is identified? Can you describe it?

Can you describe the role of state institutions (ministries, government agencies, local authorities etc.) in facilitating land acquisitions?

Can you explain the role of traditional authorities in facilitating land acquisitions?

Are you aware of the way in which the negotiations between traditional authorities, state representatives and investors take place? Can you explain the role played by local communities in this phase?

Are you aware of cases of dispossession following large-scale land acquisitions? If so, can you discuss what measures have been taken to compensate the previous land users?

Can you discuss the type of benefits brought about by these land acquisitions? In your experience, who benefits from these transactions, and how?

Do you think these land acquisitions are usually legal? If no, can you explain what laws may be violated?

Focus Group Discussion Script

The focus group discussions took place in informal settings with groups ranging from five to ten participants. The discussion was facilitated on the basis of the following set of standard questions, which however was adapted to the responses and the interests of the participants. The script of the focus group discussions was based on the following questions:

Are you aware of the presence of Company X in the district? If so, how did you get to know about it?

Has the presence of the Company affected the life of your family and yourself? If so, how?

Do you know who was using the land before the Company arrived, and what for?

Do you know how the Company chose the area for the investment? Do you know if any of the villagers helped the Company find land?

Do you know if the farmers of the area have been informed of the intention of the Company to acquire land? Has there been any public meeting to discuss this?

If you were directly affected by the arrival of the Company: were you expecting to be consulted on this investment? If so, by whom?

If you were not consulted, have you sought any form of redress, for example by contacting the village chief or the district council members?

Do you know if any local farmer has lost her or his land following the arrival of the Company? If so, do you know if she or he received any compensation for the land loss?

What was the overall reaction from community members to the arrival of the Company?

In your experience, has the whole community benefitted from the presence of the Company? If yes, how? If no, who do you think has benefitted from it?

Do you think that the Company acquired land legally?

By looking at this investment, are you satisfied with the way in which the district authorities protected the interest of the community? Why?

By looking at this investment, are you satisfied with the way in which the traditional authorities protected the interest of the community? Why?